TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted], 1911

No. [redacted]

J. B. CURTIN, APPELLANT,

vs.

H. C. BENSON ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

FILED APRIL 20, 1909.

(21,150.)

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 25, 1909.

1 In the Superior Court of the County of Tuolumne, State of California.

J. B. CURTIN, Plaintiff,

vs.

H. C. BENSON, Superintendent of Yo Semite National Park and Captain of the 4th United States Cavalry; John Doe, Richard Roe, Peter Poe, Simon Hoe, James Doe, Sergeants under said H. C. Benson in the said 4th United States Cavalry, and Henry Doe, Peter Poe, James Hoe, and James Poe, Corporals under said H. C. Benson in said 4th United States Cavalry, and William Doe, Samuel Doe, Albert Doe, and Peter Poe and Thomas Hoe, George Hoe, and Peter Hoe, Defendants.

Complaint.

Plaintiff complains of Defendant and for cause of action alleges:

I.

That by Act of Congress of the United States approved October 1st, 1890, entitled "An act to set apart certain tracts of land in the State of California, as Forest Reservations", there was created in the Counties of Mono, Madera, Mariposa and Tuolumne, in the State of California, what is known and designated by the Secretary of the Interior, as Yo Semite National Park, and that under and by virtue of said Act of Congress, the said Yo Semite National Park, so called, is placed under the exclusive control of the Secretary of the Interior, whose duty it is by said Act of Congress to make and publish such regulations and rules as may be necessary and proper for the care and management of the same, and the Defendant H. C. Benson is

2 Superintendent of said Park, so called, under appointment made by said Secretary of the Interior, and said Defendant H. C. Benson, is Captain of and in command of said 4th United States Cavalry, which Cavalry consists of a troop of soldiers of the United States army of more than One Hundred in number as plaintiff is informed and believes, all of which soldiers and cavalry said Defendant H. C. Benson at all times herein mentioned, has kept and now keeps under his command in said Yo Semite National Park; and that all of said Defendants are constantly armed with fire arms and deadly weapons.

That the Defendants John Doe, Richard Roe, Peter Poe, Simon Hoe and James Doe are fictitious names and are intended for persons who are Sergeants of and under said H. C. Benson in said 4th United States Cavalry, and the Defendants Henry Doe, Peter Poe, James Hoe and James Poe are fictitious names, and are intended for persons who are corporals of and under said H. C. Benson in said 4th United States Cavalry, and the Defendants William Doe, Samuel Doe, Albert Doe, Peter Roe, Thomas Hoe, George Hoe, and Peter Hoe are fictitious names and are intended for persons who are offi-

cers and privates of and under said H. C. Benson in said 4th United States Cavalry, and that the true names of all of said fictitious Defendants are unknown to Plaintiff, but they are necessary and proper Defendants herein, and plaintiff asks that when their true names be ascertained they be inserted herein, and be bound by these proceedings:

II.

That this Plaintiff is the owner in fee simple and absolute title of certain lands and the lessee of other lands within the Counties of Tuolumne, and Mariposa in the State of California, a portion of which land lies within Yo Semite National Park, so called, and none of which lands are under the control or management of the Secretary of the Interior, and which said lands are described as follows to wit:

All the following described lands situate in Township Two
3 South Range Twenty East Mount Diablo Meridian, described as follows:

N. ½ of Section 16, N. E. ¼ of N. W. ¼ of Section 23, W. ½ of S. W. ¼ and S. E. ¼ of S. W. ¼ of Section 14 and S. E. ¼ of Section 18 and N. E. ¼ of N. E. ¼ of Section 19. Also

All the following described lands situate in Township Two South Range Eighteen East, Mount Diablo Meridian, described as follows:

N. W. ¼ of Section 11.

All the following described lands situate in Township Two South Range Nineteen East, Mount Diablo Meridian:

Lots 1, 2, 3 and 4 and S. ½ of N. ½ and W. ½ of S. W. ¼, S. E. ¼ of S. W. ¼, and S. W. ¼ of S. E. ¼ of Section 1. Lot 1, S. ½ of N. E. ¼, and S. E. ¼ of Section 2, Lot 1, and E. ½ of S. W. ¼ of Section 3. Lot 2, S. E. ¼ of N. W. ¼, S. W. ¼ of N. E. ¼, N. W. ¼ of S. E. ¼ of Section 4. Lot 2, and S. ½ of N. E. ¼ of Section 5. Lots 1, 2 S. ½ of N. E. ¼, S. W. ¼ of S. E. ¼ of Section 6. All of Section 7. W. ½ and N. E. ¼ of Section 8. S. ½ of N. E. ¼, W. ½ of N. W. ¼, S. E. ¼ of N. W. ¼, and W. ½ of S. E. ¼ of Section 9. N. ½ of N. W. ¼ of Section 10. N. E. ¼ of Section 11. N. W. ¼ of N. W. ¼, E. ½ of N. E. ¼, and N. E. ¼ of S. E. ¼ of Section 12. S. W. ¼ of Section 13.

All the following described lands situate in Township Two South Range Twenty East, Mount Diablo Meridian:

Lots 3, 4, and S. ½ of N. W. ¼ of Section 3. S. E. ¼, S. ½ of N. E. ¼, and Lots 2 of Section 4. S. ½, and S. ½ of N. W. ¼ of Section 5. Lots 1, 2, S. ½ of N. E. ¼, and S. E. ¼ of Section 6. Lot 3, N. E. ¼ of S. W. ¼, S. E. ¼ of N. W. ¼, N. E. ¼, and N. ½ of S. E. ¼ of Section 7. N. ½ and S. W. ¼ of Section 8. N. ½, N. ½ of S. ½ and S. W. ¼ of S. W. ¼ of Section 9. N. E. ¼, S. W. ¼ and S. E. ¼ of Section 17. Lots 1, 2 and E. ½ of N. W. ¼ of Section 19. N. W. ¼ of Section 17.

All the following described lands situate in Township One South Range Nineteen East, Mount Diablo Meridian:

4 S. E. ¼ of Section 26. Lots 3 and 4 of Section 33. Lots 3, 4, 5, and 6 of Section 34. Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, E. ½ of Lot 10, and S. E. ¼ of N. W. ¼ of Section 35.

All the following described lands situate in Township One South Range Twenty East, Mount Diablo Meridian.

Lots 6, 7, 8, 9 and 10 of Section 31. Lots 1, 2, 3, 4, 5, and 6, of Section 32.

Containing in all Eight Thousand Nine Hundred and Ninety Six and 02/100 (8996.02) acres.

That all of said described lands, other than Section- 16 and 36 therein, are covered by patents duly and regularly issued by the United States Government and said lands embraced within said Section- 16 and 36 are covered by fee simple titles duly and regularly issued by the State of California.

III.

That Plaintiff is entitled to the sole, use, possession, occupation and enjoyment of every part of said lands described in paragraph II hereof as against all the world, and that the plaintiff is the owner of, and has under his control and care, cattle in the number of more than 400 head, and horses in the number of more than 25 head, and that plaintiff has heretofore for many years used and enjoyed, and is now entitled to use and enjoy all said lands hereinbefore described for a lawful purpose, to wit: the grazing of said cattle and horses thereon, and that at all times herein mentioned, plaintiff had and now has several men in his employ in caring for, and herding said cattle and horses on said land.

IV.

That leading to and in across and through said lands there are four certain public traveled toll roads established by law as such, and for many years prior to the creation of said Yo Semite National Park, so called, all of which said roads are conducted and maintained according to law, and are owned, controlled and maintained by corporations, created according to law, and all of said roads have been used and traveled upon and over by plaintiff, in going to and from said lands for more than ten years last past, and by and with the consent of the owners thereof, and no part or portion of said roads are under control or management of the Secretary of the Interior of the Defendants or any of them, or any person other than the owners thereof, and which roads are described as follows:

1st. That certain toll road connecting with the County road leading from Sonora to Yo Semite Valley, at a point on said County road on the line dividing Tuolumne and Mariposa Counties in Section Twenty Seven, Township One South, Range Seventeen East, Mount Diablo Meridian, and running thence in an Easterly direction through said lands to Yo Semite Valley in Mariposa County, California, a distance of Thirty Eight miles more or less, and known as and called the Big Oak Flat and Yo Semite Turn Pike Toll Road.

2nd. That certain Toll Road intersecting said Big Oak Flat and Yo Semite Turn Pike Toll Road about One quarter of a mile East of Sequoia in Tuolumne County, California, in Section Thirty Three, Township Two South, Range Nineteen East, Mount Diablo Me-

ridian, and running thence through said lands to Tioga on the lines between Tuolumne and Mono Counties, a distance of Fifty Six Miles.

3rd. That certain Toll Road commencing at Bower Cave in Mariposa County, California, thence leading in an Easterly direction through said lands to Yo Semite Valley, in Mariposa County, a distance of Thirty One miles, more or less, together with a spur or branch of said road leading therefrom known as Hazel Green, to a point on said Big Oak Flat and Yo Semite Turn Pike Toll Road well known as Crane Flat in Section Eighteen, in Township Two South, Range Twenty East, Mount Diablo Meridian, a distance of Four and ¼ miles more or less, and which said road and spur thereof in this subdivision mentioned is known as and called
6 the Coulterville and Yo Semite Turn Pike Road.

4th. That certain toll road beginning at Wawona, in Mariposa County, California, and running thence in a Northerly direction Twenty Six miles more or less to said Yo Semite Valley and connected therein with said Big Oak Flat and Yo Semite Turn Pike Toll Road and said Coulterville and Yo Semite Turn Pike Road.

V.

That said Defendants against the will and without the consent of plaintiff have entered into and upon said lands and have established a military post thereon and made and blazed trails and roads upon said lands and said Defendants ride horses and drive horses and wagons and teams on said lands, and by force of arms illegally and without any authority or color of law or right, have prevented plaintiff from entering upon any of said lands within said Yo Semite National Park, so called, with his said cattle and horses or any of them, and by force of arms have refused and now refuse to allow plaintiff to drive upon said lands or any part thereof, within the said Yo Semite National Park, said cattle or horses or any of them, and said Defendants threaten to continue by force of arms to prevent plaintiff or any one in his employ from entering upon said lands within the Yo Semite National Park, or any part thereof, or to graze any of Plaintiff's horses or cattle thereon, or in any manner to allow plaintiff to use said lands, and by force of arms have prevented and still prevent plaintiff, and men in plaintiff's employ, from driving any of said cattle or horses upon or along any of said toll roads to said lands.

And said Defendants within one month last past illegally and without any right or authority so to do against the protest of this plaintiff, have entered in or upon said lands both within and without said Yo Semite National Park, and have driven plaintiff's cattle from said lands a distance of more than 40 miles, and so did with the intent to injure and maim said cattle, and to injure and
7 destroy the value to plaintiff of said lands and property.—

That said Defendants have by force of arms prevented plaintiff and men in plaintiff's employ from driving his cattle or horses or any of them, in or upon said lands, or any part thereof within said Yo Semite National Park, and said Defendants threaten to take forcible possession of said plaintiff and said employees, if any or

either of them shall be on said lands or any part thereof in said Yo Semite National Park, and to take possession of said cattle and horses or any of them that may graze upon said lands in said Yo Semite National Park, and by force of arms will prevent plaintiff from driving cattle or horses to or upon said lands, or graze cattle or horses thereon, and will by said force of arms prevent plaintiff from driving said cattle or horses to said lands upon or over or along said toll roads hereinbefore described.

That if said defendants continue to drive plaintiff's cattle from said lands, as they have heretofore done, and by force of arms or otherwise prevent plaintiff from traveling upon or driving his cattle or horses upon each of said toll roads to said lands and use said lands, and the whole thereof, and graze said cattle and horses thereon, the value of plaintiff's said lands will be destroyed and plaintiff will thereby suffer great and irreparable injury and damage and by reason of the actions of Defendants as hereinbefore alleged, plaintiff has already suffered great damage in the amount of $500, and that defendants and each of them are wholly insolvent, and are unable to respond in any damages they have already caused or may hereafter cause plaintiff.

VI.

That unless said defendants and each of them and every person acting for, by, or under them, or any of them be by an injunction of this Court enjoined and restrained from in any manner, entering in or upon said lands described in paragraph II hereof,
8 or upon any part thereof, and from blazing, making or constructing any roads or trails therein or thereon, or any part thereof, and from riding or driving across or over said lands, or any part thereof, and from taking, removing or driving from said lands or from any part thereof any of plaintiff's cattle or horses, and from in any manner or by any means preventing plaintiff, and men in his employ, or any of them, from traveling upon and along the toll roads, or any of them leading to said lands as described in paragraph II hereof, plaintiff will be entirely remediless in the premises, and the value of plaintiff's said lands will be destroyed, and his said cattle and horses will be maimed and injured, and plaintiff cannot obtain any relief or compensation for said injury and damage.

Wherefore plaintiff prays Judgment:

1st. That it be adjudged and decreed that plaintiff is entitled to the possession, use and occupancy of all the lands in paragraph II hereof, hereinbefore described, and that he is entitled to at all times to graze his cattle and horses on said lands and every part hereof.

2nd. That defendants and each of them and every person acting by for or under them, or by, or for any or either of them, either as officers or privates, servants or employees, be by an injunction of this Court enjoined and restrained from entering upon, riding or driving across, or over said lands, or any part thereof, and from in any manner making or blazing any trails or roads across, or over said lands or across or over any part thereof.

3rd. That defendants and each of them and every person acting by for or under them as officers, servants, or employees be by an in-

junction of this Court, enjoined and restrained from in any
9 manner or by any means driving any of plaintiff's cattle or horses from across or over said lands, or any part thereof, and from in any manner or by any means taking possession or interfering with any of said cattle on said lands or on any part thereof.

4th. That defendants and each of them and every person acting by or through or under them, either as officers, privates, servants, agents or employees, be by an injunction of this Court restrained and enjoined from in any manner, or by any means preventing plaintiff and his employees or any or either of them from in any manner, or at any time driving said cattle and horses, or any of them, to said lands along or over any of said toll roads described in paragraph II hereof.

5th. That upon the final determination of this action said injunction be made perpetual.

6th. That this Court make and enter such other additional decree and grant to plaintiff such other and further relief herein as may be agreeable to equity.

J. A. S., Dep. Cl'k. [7th. That said plaintiff recover damages from said defendants in the sum of Five Hundred Dollars.]*

8th. For costs of suit herein.

MARSHALL B. WOODWORTH,
Attorney for Plaintiff.

STATE OF CALIFORNIA,
County of Tuolumne, ss:

J. B. Curtin being duly sworn deposes and says: That he is the Plaintiff in the above entitled action, and has read the foregoing complaint, and knows the contents thereof, and that the same is true of his own knowledge, except as to matters therein stated on his information and belief, and as to those matters he believes it to be true.

J. B. CURTIN.

Subscribed and sworn to before me, this 29th day of July 1905.
[SEAL.] ROWAN HARDIN,
Notary Public in and for Tuolumne County, California.

10 (Endorsed:) Filed July 29th, 1905. J. B. Doyle, Clerk.

STATE OF CALIFORNIA,
County of Tuolumne, ss:

I, J. B. Doyle, County Clerk and Ex-Officio Clerk of the Superior Court of said County and State, do hereby certify that the foregoing is a true and correct copy of an Original Complaint Numbered 2128, filed in the Clerk's Office of said County and State on the 29th day of July 1905, and also a true and correct copy of the Original Summons issued upon the filing of the said Complaint Number 2128, and of the endorsements thereon and the same is a correct transcript of the record thereof now in my office.

[* Words and figures enclosed in brackets erased in copy.]

In Witness Whereof, I have hereunto affixed my hand and the seal of said Court on this 29th day of July, 1905.

[SEAL.] J. B. DOYLE,
County Clerk and ex Officio Clerk of the Superior Court of the County of Tuolumne, State of California.

CLERK'S OFFICE, SUPERIOR COURT,
County of Tuolumne, ss:

In this action the defendant Omer J. Reichman sued in Complaint under name of Henry Doe, having been regularly served with process, and having failed to appear and answer the plaintiff's Complaint on file herein, and the time allowed by law for answering having expired, the default of said defendant Omer J. Reichman, sued in Complaint under name of Henry Doe in the premises is hereby duly entered according to law.

Attest my hand, and the Seal of said Court, this 11th day of August 1905.

[SEAL.] J. B. DOYLE, *Clerk*,
By B. F. FERGUSON,
Deputy Clerk.

11 *Summons.*

In the Superior Court of the County of Tuolumne, State of California.

J. B. CURTIN, Plaintiff,

vs.

H. C. BENSON, Superintendent of Yosemite National Park and Captain of the 4th United States Cavalry; John Doe, Richard Roe, Peter Poe, Simon Hoe, James Doe, Sergeants under said H. C. Benson in said 4th United States Cavalry, and Henry Doe, Peter Poe, James Hoe and James Poe, Corporals under said H. C. Benson in said 4th United States Cavalry, and William Doe, Samuel Doe, Albert Doe, and Peter Poe and Thomas Hoe, George Hoe and Peter Hoe, Defendants.

Action brought in the Superior Court of the County of Tuolumne, State of California, and the Complaint filed in the office of the Clerk of said County of Tuolumne.

Marshall B. Woodworth, Attorney for Plaintiff.

The People of the State of California send greeting to H. C. Benson, Superintendent of Yosemite National Park and Captain of the 4th United States Cavalry; John Doe, Richard Roe, Peter Poe, Simon Hoe, James Doe, Sergeants under said H. C. Benson in the said 4th United States Cavalry, and Henry Doe, Peter Poe, James Hoe, and James Poe, Corporals under H. C. Benson in said 4th United States Cavalry, and William Doe, Samuel Doe, Albert Doe, Peter Poe and Thomas Hoe, George Hoe and Peter Hoe, Defendants:

You are hereby directed to appear, and answer the complaint in an action entitled as above, brought against you in the Superior

Court of the said County of Tuolumne, State of California, within ten days after the service on you of this Summons—if served within this County; or within thirty days if served elsewhere.

12 And you are hereby notified that unless you appear and answer as above required, the said Plaintiff will take Judgment for any money or damages demanded in the Complaint, as arising upon contract and he will apply to the Court for any other relief demanded in the complaint.

Given under my hand and seal of the Superior Court of the County of Tuolumne, State of California, this 29th day of July, A. D. 1905.

[SEAL.] J. B. DOYLE, *Clerk*,
By —— ——, *Deputy Clerk*.

STATE OF CALIFORNIA,
County of Tuolumne, ss:

R. A. Curtin being duly sworn, deposes and says:

That at all times herein mentioned, affiant was a citizen of the United States, over the age of twenty-one years, and not a party to or interested in the within entitled action; that on the 31st day of July 1905, affiant personally served the within summons on the Defendant Omer J. Reichman, corporal of and in 4th United States Cavalry under Defendant H. C. Benson, sued herein under the name of Henry Doe, by delivering to him, said defendant, Omer J. Reichman, in Tuolumne County California, personally, a true copy of said summons, attached to which copy of said summons was a true copy of the Complaint in this action, with the endorsements thereon, and by advising and informing him, said defendant, Omer J. Reichman, that he was sued herein as such Corporal, under the name of Henry Doe, all of which service of said Complaint was done and made on July 31st 1905, in Tuolumne County California; that on the 1st day of August 1905, affiant personally served the within summons on the defendant, Matthew Touhey, sergeant of and in said 4th United States Cavalry, under defendant H. C. Benson,

13 sued herein under the name of John Doe, by delivering to said Defendant Matthew Touhey, personally on the 1st day of August 1905, in Mariposa County California, a copy of said summons, attached to which copy of said summons was a true copy of the Complaint filed in this action, and with the endorsements thereon, and by advising and informing him, said defendant Matthew Touhey, that he was sued and served herein as such Sergeant, under the name of John Doe, that on the 2nd day of August, 1905, affiant personally served the within summons on the defendant, H. C. Benson, Superintendent of the Yosemite National Park, and Captain of 4th United States Cavalry, by then on said 2nd day of August 1905, in Mariposa County California, delivering to him personally the said Defendant, H. C. Benson, Superintendent of the Yosemite National Park, and Captain of 4th United States Cavalry, a true copy of said summons, attached to which copy of said summons was a true copy of the Complaint in this action and with the endorsements thereon.

R. A. CURTIN.

Subscribed and sworn to before me this 4th day of August 1905.
[NOTARIAL SEAL.] ROWAN HARDIN,
Notary Public in and for Tuolumne County, California.

(Endorsed:) Filed August 11th 1905, J. B. Doyle, Clerk, By B. E. Ferguson, Deputy Clerk.

14 In the Superior Court of the County of Tuolumne, State of California.

No. 2128.

J. B. CURTIN, Plaintiff,
vs.
H. C. BENSON, Superintendent of Yosemite National Park and Captain of the 4th United States Cavalry; John Doe, Richard Roe, Peter Poe, Simon Hoe, James Doe, Sergeants under said H. C. Benson in said 4th United States Cavalry, and Henry Doe, Peter Poe, James Hoe, and James Poe, Corporals under said H. C. Benson in said 4th United States Cavalry, and William Doe, Samuel Doe, Albert Doe, and Peter Poe and Thomas Hoe, George Hoe and Peter Hoe, Defendants.

Petition for Removal.

The petition of H. C. Benson and Matthew Tuohey respectfully shows:

I.

That they are defendants in the above entitled action. That said action was begun on the 29th day of July, 1905, by the filing of the complaint therein in the office of the clerk of the above court.

II.

That said action is a suit of a civil nature arising under the laws of the United States. That the matter in dispute in said action exceeds, exclusive of interest and costs, the sum or value of two thousand dollars. That the plaintiff claims that defendants have inflicted damages upon him in the sum of five hundred dollars, for which he prays judgment, and that the defendants prevent his use of the lands hereinafter mentioned, and that the defendants should be enjoined from preventing his use thereof; which said de-
15 mands petitioners wholly dispute.

The value of the use of said lands exceeds five thousand dollars.

The plaintiff, J. B. Curtin, alleges that the defendants are depriving and threatening to deprive him of the use of 8996 & 2/10 acres of land situated in the Counties of Toulumne and Mariposa, State of California, a part of which said land, as appears from the plaintiff's complaint, lies within the boundaries of the Yosemite National Park, as established by the Act of Congress of April 22, 1905.

That the defendant H. C. Benson is the Superintendent of said Park, and as such, as Captain, has under his command a Troop of soldiers, to wit, the 4th United States Cavalry. That the names of the other officers and of the privates of said Troop are to the plaintiff unknown, and are therefore sued by fictitious names. That a portion of the lands mentioned and described lies without the limits of the said Park. That the lands in the complaint mentioned are suitable for and have been used for grazing purposes. That the defendants by force and arms and by acts of violence, have prevented and do prevent and threaten to prevent the plaintiff from the use of said lands. That the defendants by force and arms have gone upon and do go upon said lands, and have driven and do drive the cattle of the plaintiff from said lands, and have prevented and do prevent the plaintiff from driving his cattle and horses said lands along and over certain public traveled toll roads leading to and running through the said lands. That the said acts complained of have occurred constantly, and with such frequency as wholly to destroy the use of the said lands for the purposes for which they are suitable. That the defendants ride horses and drive horses and wagons and teams over said lands. That they have blazed trails and established military post- and roads on said lands. That they have by force and arms refused and now refuse to allow plaintiff to drive upon said lands his
16 cattle or horses thereon, or to permit the plaintiff to drive his cattle or horses to and upon said lands along the toll roads in said complaint described, which are within the limits of the said Yosemite National Park, and that the defendants threaten to take forcible possession of the plaintiff and his employees in the event they go upon any of the lands in the complaint described located within the said Park, and to take possession of any cattle or horses that may graze upon said lands in said Park. That if the defendants be permitted to continue to drive plaintiff's cattle from said lands and continue to prevent plaintiff from traveling or driving his cattle or horses on the said toll roads to said lands within said Park, and to graze said cattle and horses thereon, the value of plaintiff's land will be destroyed, and he will suffer irreparable injury; that the defendants are wholly insolvent, and that plaintiff has already suffered damages in the sum of five hundred dollars.

Plaintiff prays judgment that he is entitled to the possession of all of said lands. That defendants be enjoined from committing any of the acts in the complaint described, or interfering with the plaintiff's use of said roads or said lands in any manner. That plaintiff have judgment for such other relief as may be proper and for five hundred dollars' damages, and for costs.

III.

The character of the said action will further appear from the complaint on file herein, which to show the character thereof is hereby referred to and made a part hereof. That said action presents Federal questions arising under the laws of the United States, in that the defendant H. C. Benson and the members of said Troop were at the time of the commencement of said action, and at all of the

times in the complaint mentioned, and still are, officers, employees and agents of the Government of the United States, and all
17 the acts of the said defendants were committed while acting as such in the superintendency and control of the said National Park.

That in said action Federal questions do and will arise, to wit, the extent of the control of the Government of the United States over the lands situated within the said Yosemite National Park, the power of the Government of the United States to include the lands of individuals within said Park, and to require of all individuals using private lands within the limits of said National Park for grazing purposes submission to the reasonable rules and regulations of the Secretary of the Interior, made and published for the purpose of preserving, controlling and managing the said Park, and the right of the Government of the United States to require as a condition to the use of private lands within the said Park for grazing purposes the marking of the boundaries thereof prior to the driving of herds of cattle or livestock thereon, and the right of the Government of the United States and its Secretary of the Interior to enforce rules and regulations in regard to said matters, and to prevent the driving of cattle over the United States Government lands in said Park to lands of individuals. It will be necessary to determine whether the acts of defendants were legally done, in superintending said Park.

IV.

That the defendant H. C. Benson was at the commencement of this action and ever since said time has been and now is a resident and citizen of the State of Ohio. That the defendant Matthew Tuohey was at the commencement of this action and ever since said time has been and now is a resident and citizen of the State of New Jersey. That the complaint and summons in said action were served upon the defendant H. C. Benson upon the 2nd day of August, 1905, in the County of Mariposa, State of California. That the
18 complaint and summons in said action were served upon the defendant Matthew Tuohey on the 1st day of August, 1905, in Mariposa County, California. That the defendant H. C. Benson is required by the laws of the State of California to answer or plead to the complaint in this action within 30 days after the date of the service of the said summons and complaint upon him. That the defendant Matthew Tuohey is required by the laws of the State of California to answer or plead to the complaint in said action within 30 days after the date of the service of the said summons and complaint upon him.

V.

That but one other defendant has been served in said action, to wit, Omar J. Reichman, who was served with the summons and complaint in said action in the County of Tuolumne on the 1st day of August, 1905. That the time within which the said Omar J. Reichman was required to answer or plead to the complaint of the plaintiff under the laws of the State of California has expired,

but that the said Omar J. Reichman is but a nominal and unnecessary party in said action; that he is sued therein under a fictitious name, and that the complaint and summons with which he was served do not specify the true name of the said defendant. That at all the times within the complaint mentioned he was a Corporal in the said Troop of United States Cavalry, but that he committed no act and made no threat described in the complaint of plaintiff; that he has never driven any cattle or livestock from the lands of plaintiff; that he has never by force and arms, or by any act, interfered with the use of the lands of plaintiff described in his complaint; that he has never by force and arms, or in any manner prevented the use by plaintiff of the said toll roads; that he has never established any military post, or assisted in the establishment of a military post upon any of the said lands of plaintiff; that he
19 has never blazed or made any road or trail upon any of the said lands of plaintiff; that he has never assisted or abetted or threatened to assist or abet the commission of any act of the defendants described in the complaint; that he has at all times mentioned in said complaint been stationed at a post in said Park remote from the lands of plaintiff; and that he has had and could have had no connection whatever with any of the said acts; that he has inflicted no damage whatever upon the plaintiff or his property; that the complaint in said action has not been amended to include the said defendant Omar J. Reichman so as to designate him by his true name. That he is not a party to said action. That complete and adequate relief can be granted to the plaintiff without the joinder of the said Omar J. Reichman as a defendant. That said Omar J. Reichman is a resident and citizen of the State of Indiana, and was such when the action was begun and when he was served as aforesaid.

That plaintiff does not intend to serve any other defendants with summons and complaint than the said Reichman and the petitioners herein. That, as the plaintiff at all times well know, the allegations of said complaint relating to said Reichman are wholly without foundation.

VI.

That the controversy between the plaintiff and the defendants is as to each defendant separate and separable, as appears from said complaint. That no joint cause of action is alleged against the defendants either as to the acts alleged to have been committed, or as to the acts the defendants threaten to commit, or as to the damages inflicted.

VII.

That defendant Matthew Tuohey is sued in said complaint under a fictitious name, and that no amendment of said complaint
20 has been made so as to designate correctly the said defendant, but that said defendant was during part of the time mentioned in the complaint a sergeant of said Troop.

VIII.

That the petitioners herewith present their undertaking as required by law for the removal of said cause to the United States Circuit Court for the Ninth Circuit, Northern District of California;

Wherefore petitioners pray that this Court accept said undertaking and make and grant its order removing the above entitled cause to the United States Circuit Court for the Ninth Circuit, Northern District of California.

ROB'T T. DEVLIN,
United States Attorney for the Northern District of California, Attorney for Petitioners.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

H. C. Benson, being duly sworn, deposes and says: That he is one of the defendants in the within entitled cause, and a petitioner in the foregoing petition; that he has read the same, and knows the contents thereof and that the same is true except as to such matters as are therein stated on information and beuef, and as to such matters, he believes it to be true; that the facts in the foregoing petition are within the knowledge of affiant.

H. C. BENSON.

Subscribed and sworn to before me this 26th day of August, A. D. 1905.

[SEAL.] F. D. MONCKTON,
Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

(Endorsed:) Filed August 29th, 1905, J. B. Doyle, Clerk, by B. E. Ferguson, Deputy Clerk.

21 In the Superior Court of the County of Tuolumne, State of California.

No. 2128.

J. B. CURTIN, Plaintiff,
vs.
H. C. BENSON, Superintendent of Yosemite National Park, et al. Defendants.

Order on Removal.

The defendants, H. C. Benson and Matthew Tuohey, having filed in this action their petition, duly verified, praying for an order of this court directing the removal of the above-entitled cause into the Circuit Court of the United States for the Ninth Judicial Circuit, Northern District of California, and having presented good and sufficient undertakings as required by law upon such removal, and it now appearing to the Court that the removal of said cause is proper,

It is therefore Ordered that the above entitled action be and the same is hereby transferred from the Superior Court of Tuolumne County, State of California, to the Circuit Court of the United States of America for the Ninth Judicial Circuit, Northern District of California, and the Clerk of this Court is directed to deliver copies — the record and all papers in this cause to the Clerk of the said Circuit Court as in the manner required by law.

Done in open Court this 29th day of August, 1905.

G. W. NICOL, *Judge.*

(Endorsed:) Filed August 29th 1905, J. B. Doyle, Clerk, by B. E. Ferguson, Deputy Clerk.

22 In the Superior Court of the County of Tuolumne, State of California.

No. 2128.

J. B. CURTIN, Plaintiff,

vs.

H. C. BENSON, Superintendent of Yosemite National Park, et al., Defendants.

Undertaking on Removal.

The defendants, H. C. Benson and Matthew Tuohey, having filed their certain petition in the above-entitled cause, the said defendant as principal and The United States Fidelity and Guaranty Company as surety hereby acknowledge themselves jointly and severally bound unto plaintiff above named in the sum of one thousand ($1000) dollars, for the payment of which said sum to plaintiff they bind themselves, their and each of their heirs, executors, administrators and successors.

The condition of the said obligation is such that whereas the said defendant, Matthew Tuohey, has petitioned the above-entitled court for an order directing the removal of the said action from the said court to the Circuit Court of the United States of America, for the Ninth Judicial Circuit, Northern District of California, in the manner and upon the ground and for the reasons in his petition set forth.

Now, Therefore, if the said Matthew Tuohey shall enter into the said Circuit Court of the United States upon the first day of its next session a copy of the record in the above-entitled action and shall pay all costs that *they* may be awarded by the said Circuit Court, if said Court shall hold that such suit was wrongfully or improperly removed thereto, and shall also appear and shall enter special
23 bail in said suit, if special bail was originally requisite therein, and comply with all the requirements of the law applicable to the defendant petitioning for such removal, then this obligation shall be void otherwise to remain in full force and effect.

In witness whereof the principal has hereunto set his hand and

seal this 26th day of August, 1905, and the said surety has this 26th day of August, 1905, caused its official seal to be hereunto affixed and its corporate name to be subscribed hereto by its attorney in fact duly authorized.

MATTHEY TUOHEY, *Principal.*
THE UNITED STATES FIDELITY AND GUARANTY COMPANY,
By JOHN H. ROBERTSON,
Its Attorney in Fact.

[Seal of United States Fidelity and Guaranty Company.]

(Endorsed:) Filed August 29th 1905, J. B. Doyle, Clerk, by B. E. Ferguson, Deputy Clerk.

24 In the Superior Court of the County of Tuolumne, State of California.

No. 2128.

J. B. CURTIN, Plaintiff,
vs.
H. C. BENSON, Superintendent of Yosemite National Park, et al., Defendants.

Undertaking on Removal.

The defendants, H. C. Benson and Matthew Tuohey, having filed their certain petition in the above-entitled cause, the said defendant as principal and The United States Fidelity and Guaranty Company as surety hereby acknowledge themselves jointly and severally bound unto plaintiff above named in the sum of one thousand ($1000) dollars, for the payment of which said sum to plaintiff they bind themselves, their and each of their heirs, executors, administrators and successors.

The condition of the said obligation is such that whereas the said defendant, H. C. Benson, has petitioned the above-entitled court for an order directing the removal of the said action from the said court to the Circuit Court of the United States of America, for the Ninth Judicial Circuit, Northern District of California, in the manner and upon the ground and for the reasons in his petition set forth.

Now, therefore, if the said H. C. Benson shall enter into the said Circuit Court of the United States upon the first day of its next session a copy of the record in the above-entitled action and shall pay all costs that *they* may be awarded by the said Circuit Court, if said Court shall hold that such suit was wrongfully or improperly removed thereto, and shall also appear and shall enter special
25 bail in said suit, if special bail was originally requisite therein, and comply with all the requirements of the law applicable to the defendant petitioning for such removal, then this obligation shall be void otherwise to remain in full force and effect.

In witness whereof the principal has hereunto set his hand and seal this 26th day of August, 1905, and the said surety has this 26th

day of August, 1905, caused its official seal to be hereunto affixed and its corporate name to be subscribed hereto by its attorney in fact duly authorized.

H. C. BENSON, *Principal.*
THE UNITED STATES FIDELITY AND GUARANTY COMPANY, *Surety,*
By JOHN H. ROBERTSON.

[Seal of United States Fidelity and Guaranty Company.]

(Endorsed:) Filed August 29th 1905, J. B. Doyle, Clerk, By B. E. Ferguson, Deputy Clerk.

26 In the Superior Court of the County of Tuolumne, State of California.

J. B. CURTIN, Plaintiff,
vs.
H. C. BENSON, Superintendent of Yosemite National Park and Captain of the 4th United States Cavalry; John Doe, Richard Roe, Peter Poe, Simon Hoe, James Doe, Sergeants under said H. C. Benson in said 4th United States Cavalry, and Henry Doe, Peter Poe, James Hoe, and James Poe, Corporals under said H. C. Benson in said 4th United States Cavalry, and William Doe, Samuel Doe, Albert Doe, and Peter Poe and Thomas Hoe, George Hoe and Peter Hoe, Defendants.

Certificate of Clerk of said Court on Removal.

STATE OF CALIFORNIA,
Tuolumne County, ss:

I, J. B. Doyle, County Clerk and Ex Officio Clerk of the Superior Court of the State of California, in and for the County of Tuolumne, hereby certify that I have compared the annexed and foregoing copies of complaint and petition and bonds of defendants and order for removal of cause, summons, return of summons and default of Omar J. Reichman, thereunto attached, to the United States Circuit Court for the Northern District of California in the case of J. B. Curtin, plaintiff, against H. C. Benson, et al., defendants, above entitled and constituting the record in said cause with the originals now on file in my office, and that said annexed and foregoing copies are true and correct transcripts and of the whole of such originals.

In witness whereof I have hereunto set my hand and affixed the seal of said Court on the 22nd day of September 1905.

[SEAL.] J. B. DOYLE, *Clerk.*

27 (Endorsed:) No. 13827. U. S. Circuit Court, Northern District of California. J. B. Curtin, vs. H. C. Benson, as superintendent &c. et al. Transferred Record. Filed November 2, 1905, Southard Hoffman, Clerk, By W. B. Beaizley, Deputy Clerk.

28 In the Circuit Court of the United States, Ninth Circuit, in and for the Northern District of California.

J. B. CURTIN, Plaintiff,
vs.
H. C. BENSON et al., Defendants.

Stipulation Amending Complaint.

It is hereby stipulated and agreed, by and between the attorneys for the respective parties, that the bill of complaint may be amended by striking out from page 9 of the bill of complaint all of the verbiage on lines 12 and 13, which reads as follows: "7th—That plaintiff recover damages from said defendants in the sum of five hundred dollars."

It is further stipulated and agreed that said amendment may be made by the Clerk of the Court striking out said verbiage in red ink, the defendants reserving their right to demur.

ROB'T T. DEVLIN.
MARSHALL B. WOODWORTH.

Order Amending Complaint.

Upon the above stipulation it is

Ordered that the plaintiff in the above-entitled action may amend his bill of complaint as set forth in said stipulation.

Dated January 12, 1906.

WM. M. MORROW, *Judge.*

(Endorsed:) Filed Jan'y 12, 1906 Southard Hoffman, Clerk.

29 In the Circuit Court of the United States, Ninth Circuit in and for the Northern District of California.

J. B. CURTIN, Plaintiff,
vs.
H. C. BENSON et al., Defendants.

Stipulation Amending Complaint.

It is hereby stipulated and agreed by and between the attorneys for the respective parties, that the bill of complaint may be amended by striking out from page 11 of the bill of complaint all the verbiage on lines 20 and 21, which reads as follows: "7th—That plaintiff recover damages from said defendants in the sum of five hundred dollars."

It is further stipulated and agreed that said amendment may be made by the Clerk of the Court on the original bill of complaint on file in said Court, by striking out said verbiage in red ink, said bill

of complaint then to stand as amended bill of complaint of plaintiff, the defendants reserving the right to demur.

ROB'T T. DEVLIN,
United States Attorney, Representing Defendants Benson and Tuohey.
MARSHALL B. WOODWORTH,
Attorney for Plaintiff.

Order Amending Complaint.

Upon the above stipulation it is Ordered that the plaintiff in the above-entitled action may amend this bill of complaint as set forth in said stipulation, and that said bill of complaint then stand as the amended bill of complaint of plaintiff.

Dated January 17, 1906.

MORROW, *Judge.*

(Endorsed:) Filed January 17, 1906, Southard Hoffman, Clerk, By J. A. Schaertzer, Deputy Clerk.

30 In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

No. 13827.

J. B. CURTIN, Plaintiff,
vs.
H. C. BENSON, Superintendent of Yo Semite National Park and Captain of the 4th United States Cavalry; John Doe, Richard Roe, Peter Poe, Simon Hoe, James Doe, Sergeants under said H. C. Benson in the said 4th United States Cavalry, and Henry Doe, Peter Poe, James Hoe, and James Poe, Corporals under said H. C. Benson in said 4th United States Cavalry, and William Doe, Samuel Doe, Albert Doe, and Peter Poe and Thomas Hoe, George Hoe and Peter Hoe, Defendants.

The Joint Answer of H. C. Benson and Matthew Tuohey, Defendants, to the Bill of Complaint of J. B. Curtin, Plaintiff.

The defendants, H. C. Benson and Matthew Tuohey, now and all times saving unto themselves all and all manner of benefit or advantage of exception or otherwise, that can or may be had or taken to the many errors, uncertainties or imperfections in the plaintiff's bill of complaint, for answer thereto or to so much as they are advised it is material or necessary to make ansswer to:

I.

Admit that by the Act of Congress of the United States approved October 1, 1890, entitled "An Act to set apart certain tracts of land in the State of California as forest reservations," there was created in the Counties of Mono, Madera, Mariposa and Tuolumne,

in the State of California, what is known and designated by
31 the Secretary of the Interior as Yo Semite National Park.
They admit that under and by virtue of said act of Congress the said Yo Semite National Park is placed under the exclusive control of the Secretary of the Interior. They admit that it is the duty of the Secretary of the Interior to make and publish rules and regulations necessary and proper for the care and management of said park. They admit that defendant H. C. Benson is the superintendent of said park and that he was regularly and duly appointed according to law as such. But defendants allege that the boundaries of the said Yo Semite National Park are not the same as those established by said Act of Congress of the United States last hereinbefore referred to, but that the boundaries of said park have been changed and are finally determined by the Act of Congress of the United States approved February 7, 1905, entitled "An Act to exclude from the Yo Semite National Park, California, certain lands therein described and to attach and include the said lands in the Sierra Forest Reserve."

II.

Defendants admit that defendant H. C. Benson was a Captain of the Fourth United States Cavalry at the time of the commencement of this action. Defendants admit that defendant H. C. Benson was, as alleged in the bill of complaint, at the time of the commencement of this proceeding a Captain in command of troops "K" and "M" of the said Fourth United States Cavalry. Defendants allege that said troops were placed under the command of the said defendant, H. C. Benson, to enable him to exercise proper superintendency and control over the said park under and in pursuance of the rules and regulations established for the government thereof and under the directions of the Secretary of the Interior. Defendants allege that
the command of said troops was assigned to H. C. Benson
32 under and in pursuance of the provisions of the Act of Congress of the United States approved June 6, 1900, which said Act is entitled "An Act making appropriations for sundry civil expenses of the Government for the fiscal year ending June 30, 1901, and for other purposes." (31 Stats. L. 618.) Defendants allege that the number of calvarymen in the said two troops was about one hundred and twenty, the exact number varying from time to time within a limit of ten of that number. Defendants admit that prior to the commencement of this proceeding, this said proceeding having been commenced on July 29, 1905, by the filing of a complaint in the Superior Court of the State of California, in and for the County of Tuolumne, that the defendant, H. C. Benson, had kept, and they admit that at the said time of the commencement of this proceeding he did keep said troops under his said command within the said Yo Semite National Park. They admit that said troops were kept armed with firearms and deadly weapons, which said firearms and deadly weapons were the firearms with which the United States cavalrymen are required to be equipped.

III.

Referring to the lands set forth and described in paragraph two of the plaintiff's bill of complaint and to the allegations of said paragraph wherein it is stated that the plaintiff is the owner in fee simple and absolute title of certain of said lands and the lessee of the remainder of the said lands, the defendants allege that they have no knowledge or information whatever as to any right, title, claim or interest of the plaintiff in or to any of the said lands whether by lease, ownership or otherwise other than those which are located at the places within the said Yo Semite National Park which are known as Crane Flat, Gin Flat and Tamarack Flat, except that knowledge and information contained in the bill of complaint. They
33 allege that they have no belief upon the subject-matter of the said allegations as to plaintiff's ownership, interest by way of lease, or any other interest of the plaintiff in or to said lands other than those situated at said Crane Flat, Gin Flat and Tamarack Flat and they ask that the plaintiff be required to make proof of his ownership and interest in and to said lands. That the lands located at what is known as Tamarack Flat are described as follows: The Northeast Quarter (¼) of Section Twenty-three (23); the West one-half (½) of the Southwest Quarter (¼) and the Southeast Quarter (¼) of the Southwest Quarter (¼) of Section Fourteen (14), all in Township Two (2) South, Range Twenty (20) East, M. D. M. That defendants are informed and believe that the plaintiff at the time of the commencement of this proceeding was entitled to the possession of said lands under a lease thereof from the owners of said lands. That the said lands in the bill of complaint described and located at what is known as Crane Flat are the following: The Southeast Quarter (¼) of Section Eighteen (18) and the Northeast Quarter (¼) of the Northeast Quarter (¼) of Section Nineteen (19) all in Township Two (2) South, Range Nineteen (19) East, M. D. M. Whether the plaintiff has any right, title or interest in said lands at the present time the defendants have no knowledge, information or belief. That defendants are informed and believe that the plaintiff at the time of the commencement of this proceeding was entitled to the possession of said lands under a lease thereof from the owners of said lands. That the said lands in the bill of complaint described and located at what is known as Crane Flat are the following: The Southeast Quarter (¼) of Section eighteen (18) and the Northeast Quarter (14) of section nineteen (19) all in Township two (2) South, Range Nineteen (19) East, M. D. B. & M. The defendants are informed and believe that at the time of the commencement of this proceeding the plaintiff had and was en-
34 titled to the possession of said lands under a lease thereof from the owners of said lands. Whether the plaintiff has any right, title or interest in said lands at the present time, the defendants have no knowledge, information or belief. That the lands described in the bill of complaint and located at what is known as Gin Flat are the following: The North half (½) of Section Sixteen (16), Township Two (2) South, Range Sixteen (16) East, M. D. M. Defendants admit that the plaintiff was and is the owner of said lands.

IV.

Defendants admit that all of the said lands described in paragraph two of the plaintiff's bill of complaint are covered by patents duly and regularly issued by the United States Government other than the lands situated in sections designated by the numbers sixteen and thirty-six, which said last mentioned lands are covered by fee simple titles duly and regularly issued by the State of California.

V.

Defendants have no knowledge or information as to whether the plaintiff is or was entitled to the sole or any use, possession, occupation and enjoyment for grazing purposes or other purposes, or whether the plaintiff is or was entitled to the sole or any use or possession or enjoyment for grazing purposes or other purposes of the lands described in the plaintiff's bill of complaint other than those hereinbefore designated as being located at Crane Flat, Gin Flat and Tamarack Flat, except that upon said subject and matters so alleged the defendants have such information as is contained in the bill of complaint. They allege that they have no belief upon said matters and pray that the plaintiff be required to prove said allegations. As to whether at the time of the commencement of this proceeding by the filing of the said complaint in the said Superior Court of Tuolumne County the plaintiff was entitled to the sole or any use, possession, occupation and enjoyment for grazing purposes and other purposes, or to the sole or any use or possession or occupation or enjoyment for grazing purposes or other purposes of the land hereinbefore designated as being located at what is known as Crane Flat, the defendants allege that such use, possession, occupation and enjoyment for grazing purposes and other purposes as the plaintiff had or could have had over said lands were such as were consistent with and subject to the rules and regulations promulgated by the Secretary of the Interior for the government of the said Yo Semite National Park.

As to whether at the time of the commencement of this proceeding by the filing of the said complaint in the said Superior Court of Tuolumne County the plaintiff was entitled to the sole or any use, possession, occupation and enjoyment for grazing purposes and other purposes, or to the sole or any use, or possession or occupation or, enjoyment for grazing purposes or other purposes of the land hereinbefore designated as being located at what is known as Gin Flat, the defendants allege that such use, possession, occupation and enjoyment for grazing purposes and other purposes as the plaintiff had or could have had over said lands were such as were consistent with and subject to the rules and regulations promulgated by the Secretary of the Interior for the government of the said Yo Semite National Park.

That the plaintiff was and is entitled to use, possess, occupy and enjoy for grazing purposes and other purposes his said lands located at what is known as Tamarack Flat as hereinbefore designated, but that the said use, possession, occupation and enjoyment for grazing purposes and other purposes are subject to the said rules and regula-

tions hereinbefore mentioned. That all the lands owned by private individuals within the said Yo Semite National Park in-
36 cluding the lands of the plaintiff and any lands which the plaintiff has any interest in in the said Yo Semite National Park are subject to the rules and regulations hereinbefore mentioned and are subject to the control of the defendant, H. C. Benson as Superintendent in governing the said Park in accordance with said rules and regulations.

VI.

Defendants admit that plaintiff has under his control and care more than four hundred head of cattle and more than twenty-five head of horses. Defendants admit that plaintiff had at the time of the commencement of this proceeding several men in his employ for the purpose of caring for and herding said cattle and horses, but they allege that they have no knowledge or information as to the character of use that the plaintiff has made of said lands other than those designated as being located at Gin Flat, Crane Flat and Tamarack Flat. The defendants admit that leading to and across and through the said lands located at Gin Flat, Crane Flat and Tamarack Flat there are certain traveled roads, as to whether the said roads existed for many years prior to the creation of said Yo Semite National Park the defendants have no knowledge or information. As to whether the said roads are public toll roads established by law or legally established the defendants have no knowledge or information and no belief and they pray that the plaintiff may be required to establish his allegations in regard thereto. As to whether the said roads are owned, controlled and maintained, or owned or controlled or maintained by corporations created according to law, the defendants have no knowledge or information and they pray that the plaintiff shall be required to establish his allegations in regard thereto. The defendants have no knowledge or information that plaintiff in going to and from the lands in the bill of complaint described
37 has for more than ten years last past used and traveled the said roads or that he has for said period used and traveled said roads by and with the consent of the owners thereof, and the defendants have no knowledge or information as to the length of time the plaintiff has traveled said roads except that they know that plaintiff has traveled said roads within the last two years. They deny that no part or portion of said roads is under the control or management of the Secretary of the Interior; they deny that any part or portion of said roads is under the control of the defendants. They deny that any part or portion of said roads is under the control of persons other than the alleged owners thereof. They aver that the use of the said roads is and was subject to the rules and regulations for the government of said park promulgated as hereinbefore mentioned, and that defendant, H. C. Benson, had and has the right to enforce the said rules and regulations over the said Yo Semite National Park and to govern the said Yo Semite National Park in accordance therewith.

VII.

The defendants admit that the route of the said roads mentioned in paragraph four of the plaintiff's bill of complaint is as set forth in the said bill and in paragraph two thereof and in subdivisions first, second, third and fourth thereof.

VIII.

The defendants deny that they have, or either of them has ever established a military post upon any of the lands in the bill of complaint described; they deny that they have, or that either of them has ever made or blazed any trails upon said lands; they deny that they ever have, or that either of them has ever made or blazed any trail or trails any road or roads upon said lands; they deny that they ride, or that they rode or that either of them rides or ever rode any
38 horse or horses on said lands; they deny that they drive or that they drove or that they either of them drives horses or wagons or teams, or horses and wagons and teams on said lands; they deny that they, or either of them by force of arms or otherwise have prevented or prevent the plaintiff from entering upon any of the said lands within the said Yo Semite National Park (which said lands are a portion of the lands in the bill of complaint described) with his cattle and horses, or with his cattle or horses, or any part thereof; they deny that by force of arms or otherwise they have refused or that they now refuse to allow plaintiff to drive upon said lands or any of said lands within said park his said cattle and horses or his said cattle or horses or any part thereof; they deny that they, or either of them, threatened or that they have threatened or that either of them has threatened, or does threaten, to continue by force of arms or otherwise to prevent the plaintiff and persons in his employ, or to prevent the plaintiff or any person in his employ from entering upon said lands within the said Yo Semite National Park or any part thereof, or to prevent the plaintiff from grazing his horses and cattle, or his horses or cattle, thereon, or to prevent the plaintiff from using his said lands; and they deny that they have by force of arms prevented, or that they do now prevent, or that either of them has by force of arms prevented or does now prevent the plaintiff and the men in his employ, or any of them, from driving the plaintiff's cattle and horses, or any of the plaintiff's cattle or horses, upon or along the said roads described in the bill of complaint as public toll roads.

IX.

Defendants deny that within the month preceding the commencement of this proceeding the defendants, or either of them, did enter upon the lands in the bill of complaint described or upon any
39 part thereof and drive therefrom the plaintiff's cattle, or that they drove the plaintiff's cattle therefrom to a distance of more than forty miles, or that they drove the said plaintiff's cattle therefrom at all, or that they drove the plaintiff's cattle therefrom with intent to injure and maim said cattle, or with intent to injure and destroy, or injure or destroy the value of the said lands and

property to plaintiff; they deny that they, or either of them, drove cattle from the lands of the plaintiff, which lands are described in the bill of complaint; the defendants deny that they have, or that either of them has by force of arms or otherwise prevented plaintiff and his employés, or any of them, from driving his cattle and horses, or any of his cattle or horses, upon the said lands in the bill of complaint described, or upon any part thereof, within or without the said Yo Semite National Park. The defendants deny that they, or either of them, ever threatened to take forcible or any possession of the plaintiff and his employés, or any of them, or that they ever threatened so to do at all in the event that the said plaintiff or his employés should be on the said lands within the said park. They deny that they threatened, or that either of them threatens, or that they have threatened, or that either of them has threatened to take possession of said cattle and horses or any of them that might graze upon the lands in the bill of complaint described located within the said park. They deny that they will by force of arms or otherwise prevent plaintiff from driving cattle and horses to said lands or will prevent the plaintiff from grazing his cattle and horses thereon, or will prevent plaintiff from driving his cattle and horses to said lands along said roads.

X.

They deny that the plaintiff has suffered great or any damage in the amount of five hundred dollars or in any amount by reason of the acts of the defendants in the complaint described, or by reason of any acts of the defendants, or of either of them. They deny that the defendants have or will cause the plaintiff any damage whatever.

XI.

They deny that unless enjoined by this court from entering upon said lands and from blazing, making or constructing roads or trails thereon, and from leading and driving across said lands, and from taking or removing or driving plaintiff's cattle and horses therefrom and from preventing the plaintiff and the men in his employ from traveling along said roads to said lands, and they deny that unless they, or either of them, is enjoined from committing the said acts, or any of the said acts, plaintiff will be remediless, or that the value of plaintiff's lands, or any of them, will be destroyed, or that his cattle and horses, or any of them, will be maimed and injured or will be maimed or injured.

That subsequent to the commencement of this proceeding all the defendants excepting defendant H. C. Benson have been removed from the said Yo Semite National Park by virtue of an order of the Secretary of War, and that the said two troops commanded by the defendant H. C. Benson have been transported to Manila in the Philippine Islands, and that the defendant Matthew Tuohey has remained in his troop and has accompanied the same to Manila and is there engaged in the service of the United States Army for an indefinite period; that the defendant, H. C. Benson, remains the Superintendent of the said Yo Semite National Park with the like

powers which he has heretofore had, and with the like authority to superintend and control said park under the rules and regulations promulgated for the government thereof, which said authority he has heretofore possessed. That at the present time no acts
41 are committed and no acts are being committed by him as superintendent of the said park at said park or in the vicinity thereof for the purpose of governing, superintending and controlling the same, his presence and the presence of troops under his command being unnecessary during the winter season.

Defendants deny all and all manner of matter, cause or thing in the plaintiff's said bill contained, material or necessary for them to make answer to, and not herein well and sufficiently answered, confessed, traversed and avoided or denied, is true to the knowledge or belief of the defendants. All of which matters and things these defendants are ready and willing to aver, maintain and prove, as this honorable court may direct; and the defendants pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

ROBT. T. DEVLIN,
United States Attorney, Attorney for Defendants.

(Endorsed:) Due service of the within answer admitted, by copy, this 31st day of January, 1906. Answer under oath and signature of the defendants thereto being hereby expressly waived. Marshall B. Woodworth, Attorney for Plaintiff. Filed January 31, 1906. Southard Hoffman, Clerk, by W. B. Beaizley, Deputy Clerk.

42 In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

J. B. CURTIN, Plaintiff,
vs.
H. C. BENSON et al., Defendants.

Replication to Answer.

Replication to the Joint Answer of H. C. Benson and Matthew Tuohey, Defendants.

This replicant, J. B. Curtin, saving and reserving to himself all and all manner of advantages of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the joint answer of the defendants, H. C. Benson and Matthew Tuohey, for replication thereunto saith that he doth and will aver, maintain, and prove his said bill to be true, certain, and sufficient in the law to be answered unto by the said defendant, and that the answer of the said defendant is very uncertain, evasive, and insufficient in law to be replied unto by this replicant; without that, that any other matter or thing in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed, or avoided, traversed, or denied,

is true; all which matters and things this replicant is ready to aver, maintain, and prove as this honorable Court shall direct and humbly prays as in and by his said bill he hath already prayed.

MARSHALL B. WOODWORTH,
Solicitor for Complainant.

43 (Endorsed:) Service of a copy of the within is hereby acknowledged this 1st day of February A. D. 1906. Robt. T. Devlin, Attorney for Def'ts. Filed February 1st, 1906, Southard Hoffman, Clerk.

44 At a stated term, to wit: the November term A. D. 1907, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the Court Room in the City and County of San Francisco, on Wednesday the 11th day of December in the year of our Lord one thousand nine hundred and seven.

Present: The Honorable William C. Van Fleet, District Judge.

No. 13827.

J. B. CURTIN
vs.
H. C. BENSON et al.

Order for Entry of Decree.

This cause having been heretofore heard and submitted to the Court for consideration and decision, and the same having been fully considered, and the written opinion of the Honorable John J. De Haven, United States District Judge, for this District, having this day been filed herein, it is Ordered that a decree be signed, filed and entered herein in accordance with said opinion.

45 In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

No. 13827.

J. B. CURTIN, Complainant,
vs.
H. C. BENSON, Superintendent, etc., et al., Defendants.

Enrollment.

On the 2nd day of November 1905, a certified copy of the record transferred from the Superior Court of the County of Tuolume, State of California, was filed herein and is hereto annexed.

On the 12th day of January 1906, a Stipulation & Order correcting complaint was filed herein, which is hereto annexed.

On the 17th day of January 1906, a Stipulation & Order amending Complaint was filed herein, which is hereto annexed.

On the 31st day of January 1906, the Joint Answer of H. C. Benson and M. Tuohey was filed herein, which is hereto annexed.

On the 1st of February 1906, a Replication was filed herein, which is hereto annexed.

On the 11th day of December 1907, an Order directing a decree to be filed and entered in favor of defendants was made and entered herein, a copy of which is hereto annexed.

Thereafter a final decree was signed, filed and entered herein in the words and figures following to wit:

46 In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

No. 13827.

J. B. CURTIN, Plaintiff,
vs.
H. C. BENSON et al., Defendants.

Decree.

This cause came on regularly to be heard on the 20th day of March 1907 upon the admissions of the pleadings and upon the agreed statement of facts duly made and filed in said cause, and also upon oral testimony taken in open court supplementing the said agreed statement of facts, and the Court having found the facts of said cause to be as set forth in said agreed statement of facts, and having filed its findings of fact and conclusions of law herein, it is now by the Court

Ordered, adjudged, decreed and determined

I.

That those certain rules and regulations numbered "nine" and "ten" and made and promulgated by the Secretary of the Interior of the United States for the government of Yosemite National Park are valid. The said rules and regulations are, as follows:

"9. Owners of patented lands within the park limits are entitled to the full use and enjoyment thereof; such lands, however, shall have the metes and bounds thereof so marked and defined as that they may be readily distinguished from the park lands. Stock may be taken over the park lands to patented lands with the written permission and under the supervision of the superintendent.

10. The herding or grazing of loose stock or cattle of any kind on the Government lands in the park, as well as the driving of such stock or cattle over the same, is strictly forbidden, except in such cases where authority therefor is granted by the superintendent."

47 II.

That plaintiff is not entitled to the relief prayed for in the bill of complaint, nor to any relief.

III.

That this cause should be and the same is hereby dismissed and that the defendants do have and recover from said plaintiff their costs herein expended, taxed at $38.95.

Dated, December 12th 1907.

JOHN J. DE HAVEN, *Judge.*

(Endorsed:) Filed and entered December 12, 1907, Southard Hoffman, Clerk, By J. A. Schaertzer, Deputy Clerk.

48 UNITED STATES OF AMERICA:

Circuit Court of the United States, Ninth Circuit, Northern District of California.

No. 13827.

J. B. CURTIN, Plaintiff,
vs.
H. C. BENSON et al., Defendants.

Memorandum of Costs and Disbursements.

Disbursements.

Clerk's Fees	$13.70
Docket Fee	20.00
Oaths to 10 affidavits @ $.50	5.00
Certificate to Record on removal	.25

Costs taxed at $38.95.

SOUTHARD HOFFMAN, *Clerk.*

UNITED STATES OF AMERICA,
Northern District of California,
City and County of San Francisco, ss:

George Clark being duly sworn, deposes and says: That he is the Ass't U. S. Attorney and Attorney for Defendants in the above entitled cause, and as such has knowledge of the facts relative to the above costs and disbursements. That the items in the above memorandum contained are correct; that the said disbursements have been necessarily incurred in the said cause, and that the services charged therein have been actually and necessarily performed as therein stated.

GEORGE CLARK.

Subscribed and sworn to, before me, this 13th day of December A. D. 1907.

[SEAL.]

J. A. SCHAERTZER,
Deputy Clerk United States Circuit Court,
Northern District of California.

49 To J. B. Curtin and to Marshall B. Woodworth, his Attorney:

You will please take notice that on Monday the 16th day of December A. D. 1907, at the hour of 10 o'clock A. M., I will apply to the Clerk of said Court to have the within memorandum of costs and disbursements taxed pursuant to the rule of said Court, in such case made and provided.

GEO. CLARK,
Assistant U. S. Attorney, Attorney for Defendants.

Service of within memorandum of costs and disbursements, and receipt of a copy thereof acknowledged, this 14th day of December A. D. 1907.

MARSHALL B. WOODWORTH,
Attorney for Plaintiff.

(Endorsed:) Filed this 14th day of December A. D. 1907, Southard Hoffman, Clerk, By W. B. Maling, Deputy Clerk.

50 *Certificate to Enrollment.*

Whereupon, said pleadings, copy of order, decree, and a memorandum of taxed costs, are hereto annexed; said final decree being duly signed, filed and enrolled, pursuant to the practice of said Circuit Court.

Attest my hand and the seal of said Circuit Court, this 12th day of December 1907.

[SEAL.] SOUTHARD HOFFMAN, *Clerk.*
By J. A. SCHAERTZER,
Deputy Clerk.

(Endorsed:) Enrolled Papers. Filed December 12th 1907, Southard Hoffman, Clerk, By J. A. Schaertzer, Deputy Clerk.

51 In the United States Circuit Court, Ninth Circuit, Northern District of California.

No. 13827.

J. B. CURTIN, Plaintiff,
vs.
H. C. BENSON et al., Defendants.

Memorandum Decision Denying Motion to Remand.

HANFORD, *District Judge:*

The defendants are sued as officers of the United States, Captain Benson being Superintendent of the Yosemite National Park, and Commander of a troop of the Fourth Cavalry, U. S. A., and the fictitiously-named co-defendants are all described in the complaint as sergeants, corporals, other officers, and privates of the Fourth Cavalry, under command of Captain Benson.

The object of the suit is to restrain the defendants from exercising their official authority in enforcing the laws and regulations enacted and promulgated for the preservation of the national park from marauders and despoilers. Those are not the terms in which the complainant's case is stated in his pleading, but are the conclusions of the court, from a consideration of the averments of the complaint, and the laws and regulations of which the court has judicial knowledge.

The complainant avers that, as owner and lessee of nearly 9000 acres of land situated within the boundaries of the park, he is entitled to use said land for pasturing cattle thereon, and to
52 an easement in the park for driving cattle to and from his land over certain toll roads; and as it is not averred that he has conformed to the requirements of the park regulations, there is a necessary inference that he has not done so. Therefore, it is manifest that as the suit is against officers and soldiers of the United States Army in their military character, and the object is to control their conduct as officers and soldiers, not in conformity with the laws prescribed by the government, but in opposition thereto, the suit is in reality against the government, and Captain Benson, as the responsible defendant, has the absolute right to have the validity of the national law under which he is required to act, tested in the national courts.

Sergeants, corporals, and other subordinate officers and private soldiers attached to a company under command of a captain in the United States Army, have to perform their routine duties and obey orders, and they have no other functions. Therefore, in this case such officers and soldiers, whether designated by their true names or by fictitious names, and whether served or not, have no interest in the litigation, and they are mere formal parties, to be ignored in the consideration of every question affecting the jurisdiction of the court. This being the opinion of the court on the point made that all the defendants served have not joined in the petition for removal of the case from the State Court, in which it was commenced, into this court, I overrule that ground of objection to the jurisdiction.

The only other objection relied upon in the argument is that the amount or value involved in the controversy in not sufficient to bring the case within the jurisdiction of a United States Circuit Court.

This is apparently urged upon the narrow assumption that the
53 amount of damages claimed for past injuries is the measure by which the amount involved must be ascertained, as if this were an action to recover damages only; whereas, in fact, the principal ground of the complaint has reference to the future. According to his own statement the injury which the complainant will suffer as a consequence of threatened interference with his alleged rights will be equal to the value of nearly 9000 acres of land, and he appeals for judicial protection to be saved that heavy loss. As shown by the record, the amount involved is ample to give this court jurisdiction, and I direct that an order be entered denying the motion to remand.

C. H. HANFORD, *Judge*.

(Endorsed:) Filed January 2, 1906, Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

54 In the United States Circuit Court, Ninth Circuit, Northern District of California.

No. 13827.

J. B. CURTIN, Plaintiff,

vs.

H. C. BENSON et al., Defendants.

Opinion on Final Hearing.

Upon consideration of the evidence and the agreed statement of facts, filed herein, June 13, 1906, I find the following facts:

1. That the plaintiff, J. B. Curtin, owns within the limits of the Yosemite National Park the following described lands: N. ½ of Section 16; S. E. ¼ of Section 18; in Township 2 South Range 20 East.

That in addition thereto he leases from other parties the following described lands within the said Yosemite National Park: W. ½ of the S. W. ¼, and S. E. ¼ of S. W. ¼ of section 14; N. E. ¼ of N. W. ¼, Section 23; all of section 17; in Township 2 South Range 20 East; and the S. W. ¼ of section 13, Township 2 South Range 19 East.

2. That leading to said lands so owned and leased in the said Yosemite National Park by the plaintiff herein are toll roads over which the public may pass upon payment of the fees exacted by the corporation controlling said roads,—said roads having been established many years prior to the creation of said Park.

3. That the defendant, Major H. C. Benson, is the duly appointed, qualified and acting Superintendent of said Yose-
55 mite National Park, and was at the time of the commencement of the action herein such Superintendent, and has continuously acted in that Capacity from that date until the present time.

4. That the Department of the Interior has established certain Rules and Regulations for the government of the said Yosemite National Park, which said Rules and Regulations the defendant herein as such Superintendent of the said Yosemite National Park is obliged to enforce, and for the purpose of enforcing said Rules and Regulations he has a body of troops under his command.

5. That among other Rules and Regulations promulgated and established by the Secretary of the Interior are the following:

"9. Owners of patented lands within the park limits are entitled to the full use and enjoyment thereof; such lands, however, shall have the metes and bounds thereof so marked and defined as that they may be readily distinguished from the park lands. Stock may be taken over the park lands to patented lands with the written permission and under the supervision of the superintendent."

"10. The herding or grazing of loose stock or cattle of any kind on the Government lands in the park, as well as the driving of such

stock or cattle over the same, is strictly forbidden, except in such cases where authority therefor is granted by the superintendent."

6. That the plaintiff, J. B. Curtin, claims the right to drive his cattle to his said lands owned and leased by him as aforesaid in the Yosemite National Park without complying with the provisions of Section- 9 and 10 of the Rules and Regulations as set forth
56 above, claiming said Rules and Regulations to be invalid, and claiming that to deprive him of the right so to drive his cattle to and from, and graze his cattle upon, his land would work irreparable injury to him.

7. That the plaintiff herein did on one occasion place cattle upon his said lands in said Yosemite National Park, and that the said defendant, H. C. Benson, as such Superintendent did immediately remove said cattle from said lands, and refuse to allow the same to be grazed thereon until said plaintiff complied with said Rules and Regulations. That prior to the commencement of this action, the defendant, H. C. Benson, as such Superintendent of said Yosemite National Park, did refuse to allow and by force did prevent said plaintiff from driving any of his said cattle or horses in, upon or over said toll roads to his said lands in said Park, and did prevent said plaintiff from using any of his said lands in said Park until the metes and bounds thereof were properly pointed out.

That the defendant, H. C. Benson, as such Superintendent has enforced and will continue to enforce as such Superintendent of the Yosemite National Park the Rules and Regulations hereinbefore set out, until the same are declared invalid by competent authority, or his orders in reference to enforcement thereof are changed.

As a conclusion of law from the foregoing facts, and the facts admitted by the pleadings, I find that the rules and regulations made by the Secretary of the Interior, numbered 9 and 10, for the government and superintendence of the Yosemite [illegible]ional Park, and set out in the foregoing numbered 5, are valid.

2nd. That plaintiff is not entitled to the relief prayed for in the bill of complaint, or any relief.

57 3rd. That defendants are entitled to a judgment dismissing the bill of complaint, and for their costs.

Let such decree be entered.

Dated, December 11, 1907.

JOHN J. DE HAVEN, *Judge.*

(Endorsed:) Filed Dec'r 11, 1907. Southard Hoffman, Clerk, By W. B. Maling, Deputy Clerk.

58 In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

No. 13827.

J. B. CURTIN, Plaintiff,
vs.
H. C. BENSON et al., Defendants.

Agreed Statement of Facts.

It is hereby stipulated that in addition to the admissions made by the pleadings, the following are facts in the above-entitled cause:

1.

That the plaintiff, J. B. Curtin, owns within the limits of the Yosemite National Park the following described lands: N. ½ of Section 16; S. E. ¼ of Section 18; in Township 2 South Range 20 East.

That in addition thereto he leases from other parties the following described lands within the said Yosemite National Park: W. ½ of the S. W. ¼, and S. E. ¼ of S. W. ¼ of Section 14; N. E. ¼ of N. W. ¼, Section 23; all of Section 17; in Township 2 South Range 20 East; and the S. W. ¼ of Section 13, Township 2 South Range 19 East.

2.

That leading to said lands so owned and leased in the said Yosemite National Park by the plaintiff herein are toll roads over which the public may pass upon payment of the fees exacted by the
59 corporation controlling said roads,—said roads having been established many years prior to the creation of said Park.

3.

That the defendant, Major H. C. Benson, is the duly appointed, qualified and acting Superintendent of said Yosemite National Park, and was at the time of the commencement of the action herein such Superintendent, and has continually acted in that capacity from that date until the present time.

4.

That the Department of the Interior has established certain Rules and Regulations for the government of the said Yosemite National Park, which said Rules and Regulations the defendant herein as such Superintendent of the said Yosemite National Park is obliged to enforce, and for the purpose of enforcing said Rules and Regulations he has a body of troops under his command.

5.

That among other Rules and Regulations promulgated and established by the Secretary of the Interior are the following:

"9. Owners of patented lands within the park limits are entitled " to the full use and enjoyment thereof; such lands, however, shall " have the metes and bounds thereof so marked and defined as that " they may be readily distinguished from the park lands. Stock " may be taken over the park lands to patented lands with the written " permission and under the supervision of the superintendent."

"10. The herding or grazing of loose stock or cattle of any kind " on the Government lands in the park, as well as the driving of such " stock or cattle over the same, is strictly forbidden, except in such " cases where authority therefor is granted by the superintendent."

60

6.

That the plaintiff, J. B. Curtin, claims the right to drive his cattle to his said lands owned and leased by him as aforesaid in the Yosemite National Park without complying with the provisions of Sections 9 and 10 of the Rules and Regulations as set forth above, claiming said Rules and Regulations to be invalid, and claiming that to deprive him of his right so to drive his cattle to and from, and graze his cattle upon, his land would work irreparable injury to him.

7.

That the plaintiff herein did on one occasion place cattle upon his said lands in said Yosemite National Park, and that the said defendant as such Superintendent did immediately remove said cattle from said lands, and refuse to allow the same to be grazed thereon until said plaintiff complied with said Rules and Regulations. That prior to the commencement of this action, the defendant, H. C. Benson, as such Superintendent of said Yosemite National Park, did refuse to allow and by force did prevent said plaintiff from driving any of his said cattle or horses in, upon or over said toll roads to his said lands in said Park, and did prevent said plaintiff from using any of his said lands in said Park until the metes and bounds thereof were properly pointed out.

The defendant as such Superintendent has enforced and will continue to enforce as such Superintendent of the Yosemite National Park the Rules and Regulations hereinbefore set out, until the same are declared invalid by competent authority, or his orders in reference to enforcement thereof are changed, and the plaintiff prays that the defendant be enjoined from so enforcing the said Rules and Regulations on the ground that the said Rules and Regulations are invalid.

61 In addition to this stipulation, either party may introduce any other or additional evidence pertinent to the issues, subject to all legal objections as to its competency, relevancy or materiality.

June 13, 1906.

MARSHALL B. WOODWORTH,
Attorney for Plaintiff.

ROBT. T. DEVLIN,
United States Attorney, Attorney for Defendant.

(Endorsed:) Filed June 13, 1906. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

62 In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

Hon. J. J. De Haven, Judge.

J. B. CURTIN, Plaintiff,
vs.
H. C. BENSON, Superintendent, etc., Defendant.

WEDNESDAY, *March 20th*, 1907.

Appearances:

Marshall B. Woodworth, Esq., for the Plaintiff.
Robert T. Devlin, Esq., U. S. Attorney, and George Clark, Ass't U. S. Attorney, for the Defendant.

This cause now came on for trial in its regular order upon the Calendar, and the following proceedings were had before the Court.

J. B. CURTIN, the Plaintiff, sworn.

Mr. WOODWORTH:

Q. Where is your residence?
A. Sonora, California.
Q. What official position, if any, do you occupy?
A. State Senator for the 12th Senatorial District.
Q. Are you the plaintiff in this case?
A. Yes sir.

63 Q. Do you own and lease the land described in the complaint herein?
A. Yes sir.
Q. Have you a map which describes the land involved in this action?
A. I have the map furnished by the Government in its report of the Yosemite Commission. (Producing.)
Q. What does that map purport to be?
A. Showing patented lands within the Yosemite National Park, California.
Q. Point out on this map the lands owned and leased by you, and within the confines of the Yosemite National Park?
A. They are marked upon this map in pencil.
Q. Kindly describe to the Court how they are marked, and how you identify your lands from those owned by the Government.

The COURT: Is there any dispute about the ownership of the land?

Mr. WOODWORTH: No. It is simply to point out the location.

A. I will answer, Mr. Woodworth, that these lands are marked in black and red, and without going over the pleadings I could not tell

just the exact land described in the pleadings, because there are more patented lands in there than I lease and I would have to check it up.

Q. At any rate, the lands you own and lease are marked either in red or green?

A. Red or black.

Q. What is the green?

A. It is shown on here, marked on the margin of this map in a different color; the red, patented as homestead, the yellow preemption, the green, timber, and it is all indicated on the map by the Government.

Q. You have indicated with black and red crosses the lands you own and the lands you lease?

A. I would not want to answer that because, without check-
64 ing it up from the pleadings, I could not tell which is which, because there is a large body of land there.

The COURT: As long as there is no dispute, it does not make any difference.

A. (Cont'g:) My own lands are marked here. (Pointing.)

Mr. WOODWORTH:

Q. Do you pay taxes on these lands to the State of California?

A. I desire to add there is appended to this in ink a statement.

Q. Do you pay taxes on the land owned by you to the State of California?

A. Yes sir.

Q. Let me ask you this: Do any of the lands owned and leased by you come within the following description, and I now refer to an Act by the Legislature of the State, entitled "An Act to Recede and Regrant unto the United States of America the Yosemite Valley?"

A. None whatever.

Q. "And the Land Embracing the Mariposa Big Tree Grove?"

A. No sir, none whatever.

Q. Approved March 3, 1905, which gives the description of the land receded and regranted to the United States as follows——

Mr. DEVLIN: There is no dispute about that. If your Honor please, the facts briefly are that Mr. Curtin owns certain tracts of land in this reservation and leases other tracts of land in this reservation; he does not fence his land or put marks on it as required by the acts of the Government, and has not complied with the regulation of the Department. That is all there is to it.

Mr. WOODWORTH: You will admit that none of the lands owned or leased by the plaintiff come within the terms of the Act of the Legislature of this State receding and regranting the Yosemite Valley?

65 Mr. DEVLIN: Yes.

Mr. WOODWORTH:

Q. Mr. Curtin, how far from the Valley itself are your lands by road?

A. From my own land, Section 16 to South 20, it is considered fourteen miles to the hole of the Valley.

Cross-examination.

Mr. DEVLIN:

Q. One question, Senator. Approximately how many acres of land do you own?

A. Do you limit that to the inside of the Park?

Q. Yes, inside the Park?

A. 540.

Q. How many acres do you lease—inside of the Park, of course?

A. I cannot check that up, Mr. Devlin, on account of the fact that the Park lines are so crooked here. Altogether, I had at the time of the commencement of this action something like 23,000. I think the White and Fryant land and also the Miner tract—but when we get down to the South I left out nearly all the Miner tract.

Q. You do not mean you have got 23,000 acres inside the Park?

A. No, al- together. I could not figure what is inside the Park.

Q. You cannot tell what you have got inside the Park?

A. I think the agreed statement of facts that Mr. Benson and myself checked up inside of the Park is limited to a few hundred acres.

Q. These lands are used for grazing purposes?

A. Yes sir.

Q. There are no fences?

A. Yes sir, there are fences.

Q. Not on all the land?

A. No sir; the land known in sections 18 and 19——

Q. A portion is unfenced?

A. Yes sir; the largest part of it is unfenced.

66 Q. You admit you are not complying with this regulation of the Department?

A. Rules 9 and 10 mentioned?

Q. Yes.

A. I admit I have not complied with it, and furthermore, I will not comply.

Q. And do not intend to comply with it?

A. I do not intend to comply with it until I am so required to.

Mr. WOODWORTH: I desire, if your Honor please, to introduce the report of the Acting Superintendent of the Yosemite National Park in California to the Secretary of the Interior for the year 1901, being an official publication, and I make reference to page 3, and to this particular paragraph:

"After due consideration, based upon the best evidence I have "been able to obtain, I can see no objection to property owners and "those holding leased land within the park limits grazing cattle "near their own premises under the supervision of the park author- "ities."

That is all the testimony I have to offer.

H. C. BENSON, the defendant, sworn.

Mr. DEVLIN: Before I ask Major Benson any questions, I want to say, if your Honor please, the object of this testimony is this: It is admitted by the stipulation that the lands of the plaintiff are within the park. It is admitted this regulation is made by the department. It is admitted that the plaintiff in the case has not observed and does not intend to observe such regulation. The only question before the Court is, is the regulation a valid one,
67 and is he compelled to comply with it. In other words, can Major Benson, as superintendent of the park, be enjoined from carrying out the regulation of the department, made by his superior officers. My object is to strengthen that, if it be necessary—the testimony may not be admissible—to show the regulation is a reasonable one, and the reason for it, and what effect will be produced if the regulation is not carried out.

Mr. WOODWORTH: I desire to say that we claim that the Secretary of the Interior had absolutely no power to make these rules and regulations, and it is simply a question of his power.

The COURT: No matter whether they are reasonable or unreasonable.

Mr. WOODWORTH: Yes. If we should be defeated upon that point I think we could show these rules are not reasonable under the circumstances. Our point is this, that the Secretary of the Interior has no power to pass any rules or regulations which affect the vested rights of private citizens.

The COURT: I understand. I will hear the evidence. Proceed.

Mr. DEVLIN:

Q. Major, your name is what?

A. H. C. Benson.

Q. What position in the Government do you occupy?

A. Major in the 14th Cavalry; at present Acting Superintendent of the Yosemite National Park.

Q. How long have you occupied the latter position?

A. Since April 10th, 1905.

Q. Are you familiar with the lands referred to by Mr. Curtin in his testimony?

A. Yes sir. I have been on duty in the Park for several years prior to this time—since 1891.

Q. State to the Court generally why it is necessary, in your
68 opinion, to have the rule made by the Department, requiring people to mark their lines by metes and bounds in some way?

A. It is for this reason: Numerous people claim land in the Yosemite National Park, which they stated were their ranges. A number of them had these places surrounded by fences, sometimes enclosing instead of 160 acres which they had as high as several thousand acres of land. They then drove their cattle to the so called ranges and immediately let them loose and they strayed over those ranges throughout the entire reservation. Senator Curtin's cattle have been in that condition for a great many years.

Mr. WOODWORTH:

Q. Do you know that of your own personal knowledge?

A. I know that of my own personal knowledge; I was present at the time and had a correspondence myself with Mr. Curtin as far back as 1895, 1896 and 1897. These cattle, as I stated, were then turned loose and strayed throughout the entire park. I was detailed on special duty to ascertain the private claims throughout the park. In 1897 I went to Sacramento, and also recommended to Washington, and this map which is now present here is simply a copy which was used by this commission as a copy of the map which I prepared in 1897, determining the private claims within the park. The object of this was to ascertain who did own land and somewhere about where it lay. I myself went out and did considerable surveying, and found a great many people—Mr. Curtin, for instance—had fenced more land than they were entitled to, paid no attention to their own lines, but had tracts of land enclosed, and their cattle did not stay in there more than three or four days, but proceeded out to the rest of the park, so a regulation was ordered that they point out their metes and bounds, for this reason: though we might know ab-
69 solutely where they were, they themselves would claim "Those are not; our metes and bounds are out beyond; we do not care what you say about it; these are ours; I will turn my cattle loose and you can't take them up because these are lands that are ours." If they make a survey and point out their metes and bounds by an agreed understanding then, if cattle are taken up it is definitely known whether or not they are within or without that man's claim. If we do not agree as to their metes and bounds, we who know the metes and bounds know that the cattle are off of them. Then they bring suit and say those cattle were taken on our land because these other lands never having been filed on——

Mr. DEVLIN:

Q. Have you had any experience of cattle going off lands of people to whom the lands belonged on to Government lands?

A. Yes sir.

Q. How, generally, has that been. What effect has it on the property of the Government?

A. The whole place has been overrun with these cattle and sheep. The object was to keep people to the use of their own land and keep the Government land from being interfered with and being injured by the cattle travelling, and sheep travelling over it.

Q. You are the defendant in this case?

A. Yes sir.

Q. You are sued as defendant (Addressing the Court) I call the attention of the Court to that. (Addressing the witness) Have you individually or in your official capacity attempted to prevent the plaintiff from pasturing cattle on his own land?

A. None whatever, provided he complies with the rules and regulations, he can use it for any purpose on the face of this earth.

Mr. WOODWORTH: You have agreed that is the very thing he has done.

Mr. DEVLIN: No.

70 The COURT: I shall be governed by the agreed facts, and you can argue the case afterwards.

The WITNESS: Mr. Curtin has.

Mr. DEVLIN:

Q. Have you invariably enforced the rule of the Department as to any land outside of the Park?

A. None whatever; not one foot.

Q. I will show you this map which purports to be the map of the Yosemite National Park, and ask you if that shows the metes and bounds of the Park? (Handing.)

A. It correctly does except for a small portion down here which has been changed by the Act of February 7th of last year, but does not involve any of the land in controversy with Mr. Curtin.

Mr. WOODWORTH: I desire to offer that map in evidence.

Mr. DEVLIN: It will be considered in for both parties.

Cross-examination.

Mr. WOODWORTH:

Q. Is it not a fact that you have removed cattle and stock from the land of Senator Curtin on the ground that he had not complied with this rule and had not fenced his land?

A. Yes sir.

Q. It is a fact?

A. Yes sir.

Q. And you propose, as stated in the agreed statement of facts here, to keep him from using his lands or driving his cattle to and from his lands until he does set out these lands by metes and bounds?

The COURT: I want to say this: If those facts are agreed on and filed here, I shall be governed by them even though you should succeed in disproving them.

The WITNESS: I do not attempt to disprove that. I admit that. Those are the facts.

71 Mr. WOODWORTH:

Q. You say that the defendant has not surveyed his land and has not pointed them out by metes and bounds. Could not the United States do that as well as the plaintiff?

A. It could.

Q. And is it not a fact that they have done so?

A. No sir.

Q. How do they issue the patents to these lands if they have not done so?

A. They have surveyed the section lines but they have not surveyed the interior lines of the various sections. The township lines are surveyed.

Q. Don't you know that Mr. Curtin, the plaintiff here, had caused surveys to be made of the lands on Crane Flat?

A. Yes sir, and he was given permission to pasture his cattle there as soon as he complied with those regulations.

Q. In other words, before he could pasture his cattle on his own land he had to get a permit for it to do it. After he did survey them the permit was granted?

A. Yes sir.

Q. And is it not a fact, with reference to the reasonableness of these rules that after this survey was made by Senator Curtin you refused to permit him to put a fence on the land surveyed by him on the ground that your surveys differed from his?

A. Yes sir; and his survey was proven by the geological survey to be incorrect.

Q. And did you not leave orders to arrest Senator Curtin if he did erect a fence according to the survey made by him?

A. I did not.

Q. Have you personally seen any cattle within the cleft or gorge of the Yosemite Valley proper which had strayed from the
72 surrounding country?

A. No sir.

Q. So that as to the land which has been receded by the State, so far as that body of land is considered, no cattle have ever strayed in that body, so far as you know?

A. I knew nothing about the Yosemite Valley during the time it belonged to the States. It has not, since last August.

Q. But during your own experience I am asking?

A. No sir.

Q. There is nothing to prevent the Government from fencing its own land, is there?

A. Not that I know of.

Q. And it is a fact that you, in carrying out these orders, require permits from persons who seek to use the toll road for the purpose of driving cattle to and from land owned by them, and owned by them long before it became a National Park?

A. What is that?

Q. It is a fact that you have enforced the rules referred to in this case?

Mr. DEVLIN: That is our case.

A. Why, certainly.

Redirect-examination.

Mr. DEVLIN:

Q. I think you answered this question, but I will ask you again: Did you find that Mr. Curtin had embraced in his survey certain lands belonging to the Government?

A. Ye sir.

Q. And he attempted to enclose them?

A. He wanted to, yes. He would have enclosed them had he put the fences up where he was in the habit of. The necessity for that was he claimed a camp of ours was on his private land and in

order to ascertain that fact, not for the question of cattle,
73 but in order to ascertain whether that camp which he claimed to be on his own private land was so, the Government ordered the geological survey to make an accurate survey to within less than an inch or two of the exact distance, and it was found that that camp was well on Government land.

Recross-examination.

Mr. WOODWORTH:

Q. By reason of that survey you therefore know just what are park lands and what are lands belonging to private owners?

A. At that particular place, yes.

Q. For the same reason you could ascertain at any place within the confines of the National Park what lands are patented lands owned by private persons, and what are, strictly speaking, Park lands, could you not?

A. Yes sir.

Q. You say that the defendant did enclose public lands. Did you notify him of that fact?

A. Yes sir.

Q. And did you give notice of the fact that he had enclosed Park lands?

A. I did.

The COURT: Your object is to show there was a question of disputed boundaries between other persons?

Mr. WOODWORTH: No.

The COURT: Then what has it got to do with the case.

Mr. WOODWORTH: I confess I do not think it has very much.

The COURT: I cannot see that it has.

Mr. WOODWORTH: I believe that is all.

Testimony closed.

(Endorsed:) Filed March 20, 1907, Southard Hoffman, Clerk, By W. B. Maling, Deputy Clerk.

(Here follow maps marked pp. 73*a* & 73*b*.)

MAPS

TOO

LARGE

FOR

FILMING

74 In the Circuit Court of the United States, Ninth Circuit, in and for the Northern District of California. In Equity.

No. 13827.

J. B. CURTIN, Complainant,
vs.
H. C. BENSON et al., Defendants.

Petition on Appeal.

To the Honorable Circuit Court of the United States, Ninth Circuit, in and for the Northern District of California:

The above named complainant in the above entitled cause, J. B. Curtin, conceiving himself aggrieved by the judgment and decree made and entered by the above named Court in the above entitled case under date of December 12, 1907, and filed with the Clerk of said court in said cause on said date, wherein and whereby, among other things, it was ordered, adjudged and decreed by said Court that said bill of complaint and said cause be dismissed, does hereby appeal to the United States Supreme Court from said judgment and decree, and from each and every part thereof; and he prays that his petition for his said appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said judgment and decree was made and entered, duly authenticated, may be sent to the United States Supreme Court.

MARSHALL B. WOODWORTH,
Solicitor for Complainant.

J. B. CURTIN,
In Propria Persona, of Counsel.

Dated at San Francisco, February 18" 1908.

(Endorsed:) Filed February 18, 1908, Southard Hoffman, Clerk, By J. A. Schaertzer, Deputy Clerk.

75 In the Circuit Court of the United States, Ninth Circuit, in and for the Northern District of California. In Equity.

No. 13827.

J. B. CURTIN, Complainant,
vs.
H. C. BENSON et al., Defendants.

Assignment of Errors.

Now comes the complainant in the above entitled cause and files the following assignment of errors upon which he will rely in his appeal this day taken from the judgment and decree made and en-

tered by the above entitled Court under date of December 12, 1907, and filed with the Clerk of said Court in said cause on said day, dismissing the bill of complaint in said cause; that is to say:

I.

That the said Circuit Court committed manifest error in holding that the Department of the Interior had any right to make or enforce any rule respecting the use of private property or of public toll-roads within the State of California.

II.

That said Circuit Court committed manifest error in holding that the Department of the Interior had any right to make or enforce any rule respecting the use of private property or of any public toll-roads within the confines of the Yosemite National Park.

76

III.

That the said Circuit Court committed manifest error in holding that the Department of the Interior had any right, in making rules and regulations for the government of the Yosemite National Park, to make and enforce the following rules and regulations:

"9. Owners of patented lands within the Park limits are entitled to the full use and enjoyment thereof; such lands, however, shall have the metes and bounds thereof so marked and defined as that they may be readily distinguished from the park lands. Stock may be taken over the park lands to patented lands with the written permission and under the supervision of the superintendent."

"10. The herding and grazing of loose stock or cattle of any kind on the Government lands in the park, as well as the driving of such stock or cattle over the same, is strictly forbidden, except in cases where authority therefor is granted by the superintendant."

IV.

That said Circuit Court committed manifest error in holding that the Department of the Interior, in making and enforcing rules and regulations for the government of the Yosemite National Park, had any right to apply and enforce rules "9" and "10" thereof to private property or public toll-roads within the confines of the Yosemite National Park, in view of the fact that the State of California had never ceded its political or sovereign jurisdiction over the lands within the Yosemite National Park to the United States.

V.

That said Circuit Court committed manifest error in not holding that rules "9" and "10" for the government of the Yosemite National Park were, and should be, limited and made to apply in
77 their legal effect only to lands owned by the United States within the confines of the Yosemite National Park, and did not and could not be made to apply to the lands of private owners or

to the use of the public toll-roads within the limits of the Yosemite National Park, in view of the fact that the State of California had never ceded its political and sovereign jurisdiction over the lands within the Yosemite National Park to the United States.

VI.

That said Circuit Court committed manifest error in holding that the Department of the Interior had any right to make or enforce any rules or regulations affecting the free use and enjoyment of private property or of the public toll-roads within the confines of the Yosemite National Park, the political and sovereign jurisdiction of the State of California not having been ceded to the United States.

VII.

That the said Circuit Court committed manifest error in holding that the free use and enjoyment of private property or of public toll-roads within the confines of the Yosemite National Park, could be affected and regulated by rules made and enforced by the Department of the Interior, the political and sovereign jurisdiction of the State of California over the lands within the Yosemite National Park not having been ceded to the United States.

VIII.

That said Circuit Court committed manifest error in holding that Owners of private property within the confines of the Yosemite National Park must first comply with the requirements of rule- "9" and "10," promulgated by the Department of the Interior for the government of the Yosemite National Park, before being per-
78 mitted by the defendant H. C. Benson, as military superintendent of the Yosemite National Park, and the other defendants, soldiers acting under his command, to use their private lands to graze their cattle and horses thereon, the State of California never having ceded its political and sovereign jurisdiction over the lands within the confines of the Yosemite National Park to the United States.

IX.

That said Circuit Court committed manifest error in holding that owners of private land within the confines of the Yosemite National Park must first comply with the requirements of rule "9" promulgated by the Department of the Interior for the government of the Yosemite National Park, in fencing or otherwise enclosing their private lands, before being permitted, by the defendant H. C. Benson, as military superintendent of the Yosemite National Park, and the other defendants, soldiers under his command, to use their private lands to graze their cattle and horses thereon, the State of California never having ceded its political and sovereign jurisdiction over the lands within the confines of the Yosemite National Park to the United States.

X.

That said Circuit Court committed manifest error in holding that owners of private lands within the confines of the Yosemite National Park should first comply with the provisionss of rules "9" and "10" promulgated by the Department of the Interior for the government of the Yosemite National Park, before being permitted, by the defendant H. C. Benson, as military superintendent of the Yosemite National Park, and the other defendants, soldiers acting under his command, to use the public toll-roads to drive their cattle and horses to and from their lands, the State of California never having ceded its political and sovereign jurisdiction over the lands within
79 the confines of the Yosemite National Park to the United States.

XI.

That said Circuit Court committed manifest error in holding that private property and public toll-roads within the confines of the Yosemite National Park were under the exclusive control of the Department of the Interior, the State of California never having ceded its political and sovereign jurisdiction over the lands within the confines of the Yosemite National Park to the United States.

XII.

That the said Circuit Court committed manifest error in not holding that private property and public toll-roads within the confines of the Yosemite National Park were subject to the political and sovereign jurisdiction and laws of the State of California and not of the United States, the State of California never having ceded its political and sovereign jurisdiction over the lands within the confines of the Yosemite National Park to the United States.

XIII.

That the said Circuit Court committed manifest error in holding that private property and public toll-roads within the confines of the Yosemite National Park were subject exclusively to the political jurisdiction and laws of the United States, the State of California never having ceded its political and sovereign jurisdiction over the lands within the confines of the Yosemite National Park to the United States.

XIV.

That the said Circuit Court committed manifest error in holding that the political jurisdiction and sovereignty of the State of
80 California over private lands or public toll-roads within the confines of the Yosemite National Park had been ceded to the United States by the State of California.

XV.

That the said Circuit Court committed manifest error in holding that the United States had any further or greater right over lands

owned by it within the confines of the Yosemite National Park than any ordinary proprietor, the State of California never having ceded its political and sovereign jurisdiction over the lands within the confines of the Yosemite National Park to the United States.

XVI.

That the said Circuit Court committed manifest error in not holding that, until the State of California cedes to the United States its political and sovereign jurisdiction over the Yosemite National Park, every foot of territory therein and every person therein is subject to the laws of the State of California, and to none other.

XVII.

That the said Circuit Court committed manifest error in not holding that powers not delegated to the United States by the Constitution, nor prohibited by it to the States, were reserved to the States respectively, or to the people.

XVIII.

That the said Circuit Court committed manifest error in holding that the United States could legally acquire land for any other purposes than those set forth in Article 1, Section 8, Subdivision 17, of the Constitution of the United States.

81 XIX.

That the said Circuit Court committed manifest error in holding that the United States could legally acquire the "Yosemite Valley" for a public park or for any other purposes than those set forth in Article 1, Section 8, Subdivision 17, of the Constitution of the United States.

XX.

That the said Circuit Court committed manifest error in holding that the lands owned and leased by the complainant, J. B. Curtin, came within the terms of the Act of the Legislature of the State of California, of March 3, 1905, receding and regranting the "Yosemite Valley" to the United States.

XXI.

That the said Circuit Court committed manifest error in holding that rules "9" and "10," made and enforced by the Department of the Interior for the government of the Yosemite National Park, were reasonable rules.

XXII.

That the said Circuit Court committed manifest error in holding that rules "9" and "10," made and enforced by the Department of the Interior for the government of the Yosemite National Park, were reasonable rules and were enacted for the protection of the health,

safety or morals of the people of the State of California, the State of California never having ceded its political and sovereign jurisdiction over the lands within the confines of the Yosemite National Park to the United States.

XXIII.

That the said Circuit Court committed manifest error in holding that the plaintiff was not entitled to the relief prayed for in the bill of complaint, or to any relief.

82 XXIV.

That the said Circuit Court committed manifest error in holding that the defendants were entitled to a judgment dismissing the bill of complaint and for their costs.

MARSHALL B. WOODWORTH,
Solicitor for Complainant.

J. B. CURTIN,
In Propria Persona, of Counsel.

(Endorsed:) Service admitted this 18th day of Februry, 1908. Robt. T. Devlin, Att'y for Defendant. Filed February 18, 1908, Southard Hoffman, Clerk, By J. A. Schaertzer, Deputy Clerk.

83 In the Circuit Court of the United States, Ninth Circuit, in and for the Northern District of California.

In Equity. No. 13827.

J. B. CURTIN, Complainant,
vs.
H. C. BENSON et al., Defendants.

Order Allowing Appeal.

The plaintiff in the above entitled action, having presented to this Court in open session, on this day 18th of February, 1908, in the November (1907) Term, his petition on appeal to the United States Supreme Court from the judgment and decree made and entered by this Court in said cause under date of December 12, 1907, among other things, dismissing the bill of complaint in said cause, and having prayed therein the Court that his said petition for his said appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said judgment and decree was made, duly authenticated, may be sent to the United States Supreme Court; and having presented to the Court at the same time an assignment of errors alleged by him in the record and proceedings of this Court in said Cause, and having by his counsel moved the Court for an order allowing said appeal and directing the Clerk of this Court accordingly; and the Court being fully advised in the premises;

On motion of Marshall B. Woodworth, attorney and of counsel for said complainant, it is ordered that the complainant's said ap-

peal to the United States Supreme Court from said order and
84 judgment made and entered by this Court in said cause under date of December 12, 1907, and filed therein under date of December 12, 1907, be and the same is hereby allowed; and, further, that a certified transcript of the record, files, exhibits and all proceedings and papers in said cause be prepared and transmitted by the Clerk of this Court to the United States Supreme Court within the time prescribed by the rules of said Court.

And it is further ordered that the plaintiff's bond for costs on said appeal be, and the same is, hereby fixed at the sum of Five hundred ($500) Dollars.

Done in open Court, this day 18th of February, A. D. 1908.

W. C. VAN FLEET, *Judge.*

(Endorsed:) Service admitted this 18 day of February, 1908. Robt. T. Devlin, Att'y for Defendants. Filed February 18, 1908, Southard Hoffman, Clerk, By J. A. Schaertzer, Deputy Clerk.

85 *Bond on Appeal.*

Know all men by these presents, That we, J. B. Curtin as principal, and C. U. Barlow and J. P. Hughes, as sureties, are held and firmly bound unto H. C. Benson et al., in the full and just sum of Five hundred ($500) dollars, to be paid to the said H. C. Benson et al., their certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 20th day of February in the year of our Lord One Thousand Nine Hundred and Eight.

Whereas, lately at a Circuit Court of the United States, for the Northern District of California, in a suit depending in said Court, between J. B. Curtin and H. C. Benson et al., a judgment was rendered against the said J. B. Curtin and the said J. B. Curtin having obtained from said Court an appeal to reverse the judgment in the aforesaid suit, and a citation directed to the said H. C. Benson et al., citing and admonishing them to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California.

Now, the condition of the above obligation is such, That if the said J. B. Curtin shall prosecute his said appeal to effect, and answer all damages and costs if he fails to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

J. C. CURTIN. [SEAL.]
C. U. BARLOW. [SEAL.]
J. P. HUGHES. [SEAL.]

Acknowledged before me the day and year first above written, by C. U. Barlow and J. P. Hughes.

[SEAL.] MARTIN ARONSON,
Notary Public in and for the City and County of San Francisco, State of California.

My commission expires Sept. 20, 1911.

86 STATE OF CALIFORNIA,
County of Tuolumne, ss:

On this 25th day of February in the year One Thousand Nine Hundred and Eight before me, Rowan Hardin, a Notary Public in and for the County of Tuolumne, personally appeared J. B. Curtin known to me to be the person whose name is subscribed to the within instrument, and he duly acknowledged to me that he executed the same.

In witness whereof, I have hereunto set my hand and affixed my Official Seal at my office in the County of Tuolumne, the day and year in this certificate first above written.

[SEAL.] ROWAN HARDIN,
Notary Public in and for the County of Tuolumne, State of California.

UNITED STATES OF AMERICA,
Northern District of California, ss:

J. P. Hughes, and C. U. Barlow being duly sworn, each for himself, deposes and says, that he is a freeholder in said District, and is worth the sum of Five hundred Dollars, exclusive of property exempt from execution, and over and above all debts and liabilities.

J. P. HUGHES.
C. U. BARLOW.

Subscribed and sworn to before me, this 20 day of February A. D. 1908.

[SEAL.] MARTIN ARONSON,
Notary Public in and for the City and County of San Francisco, State of California.

My commission expires Sept. 20, 1911.

(Endorsed:) Form of bond and sufficiency of sureties approved. W. C. Van Fleet, Judge. Filed February 28th, 1908. Southard Hoffman, Clerk.

87 In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

No. 13827.

J. B. CURTIN, Complainant,
vs.
H. C. BENSON et al., Defendants.

Certificate to Record.

I, Southard Hoffman, Clerk of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, do hereby certify the foregoing

Eighty-six (86) pages, numbered from 1 to 86 inclusive, to be a full, true and correct copy of the record and all proceedings in the above entitled cause, and that the same constitute the record on appeal to the Supreme Court of the United States.

I Further Certify that the cost of the foregoing transcript of record on appeal is $48.80; that said amount was paid by the Attorney for the Complainant; and that the original Citation issued in said cause is hereto annexed.

In testimony whereof, I have hereunto set my hand and affixed the Seal of said Circuit Court, this 22nd day of April, A. D., 1908.

[Seal U. S. Circuit Court, Northern Dist. Cal.]

SOUTHARD HOFFMAN,
Clerk of United States Circuit Court, Ninth Judicial Circuit, Northern District of California.

88 UNITED STATES OF AMERICA, *ss:*

The President of the United States, to H. C. Benson et al., and Robert T. Devlin, their attorney (U. S. Attorney), Greeting:

You are hereby cited and admonished to be and appear at a United States Supreme Court, to be holden at the City of Washington, in the District of Columbia, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States Circuit Court for the Northern District of California, wherein J. B. Curtin is appellant, and you are appellees, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable W. C. Van Fleet, United States District Judge for the Northern District of California, this 18th day of February, A. D. 1908.

W. C. VAN FLEET,
United States Dist. Judge.

89 [Endorsed:] 13827. U. S. Circuit Court. No. —. U. S. Supreme Court. J. B. Curtin, Appellant, vs. H. C. Benson et al., Appellees. Citation on Appeal. Filed February 18th, 1908, Southard Hoffman, Clerk U. S. Circuit Court. By J. A. Schaertzer, Deputy Clerk.

UNITED STATES OF AMERICA, *ss:*

On this 18" day of February, in the year of our Lord one thousand nine hundred and eight, personally appeared before me F. D. Monckton, Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, the subscriber, Marshall B. Woodworth, and makes oath that he delivered a true copy of the within citation to the U. S. Attorney for the Northern District of California, the attorney for the defendants.

MARSHALL B. WOODWORTH.

Subscribed and sworn to before me at San Francisco, California this 18″ day of February, A. D. 1908.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

MEREDITH SAWYER,
Deputy Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

Service admitted.

ROB'T T. DEVLIN,
Att'y for D'f'ts.

Endorsed on cover: File No. 21,150. N. California C. C. U. S. Term No. 146. J. B. Curtin, appellant, vs. H. C. Benson et al. Filed April 29th, 1908. File No. 21,150.

Yosemite National Park

Private Property vs. Federal Regulations

In the Supreme Court of the United States

IN EQUITY.

J. B. CURTIN,
Petitioner and Complainant,
vs.
H. C. BENSON, (Major 14th Cavalry, U. S. Army, and Superintendent of the "Yosemite National Park") et al.,
Respondents and Defendants.

No. 146

OPENING BRIEF ON BEHALF OF PETITIONER.

This is a suit in equity to restrain and enjoin the defendant, a military officer and superintendent of the Yosemite National Park, and his subordinates, soldiers under his command, first, from interfering, in any manner, with the enjoyment by petitioner of lands

owned and leased by him, and second, from preventing the petitioner, his agents and employes from traveling the public toll-roads or highways leading to his lands, all of which lands are patented lands and the roads referred to public toll-roads within the limits of the Yosemite National Park.

The suit was brought in the Superior Court of the State of California, in and for the County of Tuolumne, and was removed by the defendant, H. C. Benson, to the United States Circuit Court, Ninth Circuit, in and for the Northern District of California.

The testimony on the part of the petitioner was being taken in San Francisco, when the catastrophe of April 18, 1906, took place, and all of the shorthand notes of the reporter were destroyed by fire. Thereafter, an agreed statement of facts was entered into between counsel for the respective parties.

This stipulation of facts shows:

First: That the petitioner owns and also leases large tracts of land situated within the confines of the Yosemite National Park;

Second: That leading to and from the lands so owned and leased by petitioner there are certain public toll-roads, which roads were established many years prior to the creation of said park;

Third: That the defendant, H. C. Benson, as such superintendent and military officer, and the other defendants as soldiers acting under his command, did forcibly refuse to allow and did prevent, and will continue forcibly to refuse to allow and to prevent, said petition-

er from using the public toll-roads to and from his lands, and from utilizing his lands to graze several hundred head of cattle and horses thereon, unless the petitioner shall first comply with the terms of certain rules and regulations promulgated by the Secretary of the Interior for the government of the Yosemite National Park, which the petitioner refuses to do.

The specific rules and regulations involved in this controversy are as follows:

> "9. Owners of patented lands within the park limits are entitled to the full use and enjoyment thereof; such lands, however, shall have the metes and bounds thereof so marked and defined as that they may be readily distinguished from the park lands. Stock may be taken over the park lands to patented lands with the written permission and under the supervision of the superintendent.
>
> "10. The herding or grazing of loose stock or cattle of any kind on the Government lands in the park, as well as the driving of such stock or cattle over the same, is strictly forbidden, except in such cases where authority therefor is granted by the superintendent."

The "Yosemite Valley," by which term reference is simply made to the "cleft" or "gorge" so noted for its remarkable scenery and natural wonders, was ceded to the State of California by the United States on June 30, 1864, "in trust for public use, resort and recreation." On October 1, 1890, Congress created a National Park out of the public lands comprehending and encom-

passing the "Yosemite Valley." In other words, it withdrew from entry the "Yosemite Valley" and in addition a certain quantity of public land which was contiguous to and immediately surrounded the "Yosemite Valley." This tract of land, now known as "Yosemite National Park," embraces 1512 square miles of land, and within the confines of the park there are some 63,160 acres of land patented to individuals by the United States previous to the passage of the act of Congress of October 1, 1890, creating the park, and there also are many school sections (16 and 36), which, upon the approval of the official survey, passed to the State of California, without certification or proceedings of any kind.

Cooper v. *Roberts*, 18 How, 173; 15 L. Ed. 338.
Cowell vs. *Lammers*, 10 Sawy. 246, *251.*
Davis v. *Weibbold*, 139 U. S. 507; 35 L. Ed. 238.

In the act creating the park it is therein declared:

"Section 1. That the tract of land in the State of California known and described as township numbered eighteen south, of range numbered thirty east, also township eighteen, south range thirty-one east; and sections thirty-one, thirty-two, thirty-three and thirty-four, township seventeen, south range thirty east, all east of Mount Diablo meridian, is hereby reserved and withdrawn from settlement, occupancy, or sale under the laws of the United States, and dedicated and set apart as a public park, or pleasure ground, for the benefit and enjoyment of the people; and all persons who shall locate or settle upon, or occupy the same or any part

thereof, except as hereinafter provided, shall be considered trespassers and removed therefrom.

"Section 2. That said public park shall be under the exclusive control of the Secretary of the Interior, whose duty it shall be, as soon as practicable, to make and publish such rules and regulations as he may deem necessary or proper for the care and management of the same. Such regulations shall provide for the preservation from injury of all timber, mineral deposits, natural curiosities or wonders within said park, and their retention in their natural condition. The Secretary may, in his discretion, grant leases for building purposes for terms not exceeding ten years of small parcels of ground not exceeding five acres, at such places in said park as shall require the erection of buildings for the accommodation of visitors; all of the proceeds of said leases and other revenues that may be derived from any source connected with said park to be expended under his direction in the management of the same and the construction of roads and paths therein. He shall provide against the wanton destruction of the fish and game found within said park, and against their capture or destruction, for the purposes of merchandise or profit. He shall also cause all persons trespassing upon the same after the passage of this act to be removed therefrom, and, generally, shall be authorized to take all such measures as shall be necessary or proper to fully carry out the objects and purposes of this act." (24 Stat. at Large, 478; 6 Fed. St. annotated, 623.)

The case was argued orally before Hon. John J. De

Haven, United States District Judge for the Northern District of California, then sitting in the United States Circuit Court for the Northern District of California, and was submitted on elaborate briefs filed by both sides.

The learned Judge adopted the agreed statement of facts as his findings of fact (See transcript of Record pp. 33-34, for "Agreed Statement of Facts", and pp. 31-32 for "Findings of Facts and Conclusion of Law"), and his conclusion of law was as follows:

"As a conclusion of law from the foregoing facts, and the facts admitted by the pleadings, I find that the rules and regulations made by the Secretary of the Interior, numbered 9 and 10 for the government and superintendence of the Yosemite National Park, and set out in the foregoing numbered 5, are valid".

The learned Judge did not file any opinion in the case, the document entitled "Opinion on Final Hearing" (transcript of Record, pp. 31-32) being simply the "Findings of Fact and Conclusion of Law" filed in the case, as above stated.

Under the above state of facts, the question squarely raised and presented for decision is:

HAS THE DEPARTMENT OF THE INTERIOR ANY RIGHT WHATEVER TO MAKE OR ENFORCE ANY RULES RESPECTING THE USE OF PRIVATE PROPERTY OR OF PUBLIC TOLL-ROADS WITHIN THE STATE OF CALIFORNIA?

This involves, clearly, a question of constitutional authority.

It is an established fact in the case, *that the State of California has not ceded to the United States its political jurisdiction to a foot of land within the Yosemite National Park.*

Such being the established fact, the United States, through any of its departments, has *no* right whatever to make or enforce any rules respecting the use of private property or of public toll-roads within the Yosemite National Park.

California was admitted into the Union on September 9, 1850, "on an equal footing with the original States in all respects whatever." The Yosemite National Park was created by an Act of Congress, approved October 1, 1890.

Any power or authority which was reserved by the Constitution to any of the original States was reserved to California when admitted into the Union, and California, never having ceded political jurisdiction over the Yosemite National Park to the United States, the latter is simply an "ordinary proprietor" of the land owned by it.

Lowe vs. *Fort Leavenworth R. R. Co.*, 114 U. S. 525-*527;* 29 L. Ed. 264-*265.*

The Fort Leavenworth Military Reservation case, above cited, is squarely in point, and the question of conflict of jurisdiction between Federal and State government over that Reservation is drawn directly into consideration.

In that case, the Reservation referred to was acquir-

ed by the Louisiana purchase in 1803, and shortly afterwards the land in that Reservation was withdrawn from settlement, occupancy, or sale, and was continuously occupied as a Military Reservation, and when, in 1867, many years later, Kansas was admitted into the Union on "an equal footing with the original States" without saving to the United States government *political jurisdiction* over this Reservation, it was held that: "The United States, therefore, retained *after* the admission of the State, only the *rights of an ordinary proprietor;* except as an instrument for the execution of the powers of the General Government, *that part* of the tract which was *actually* used for a *fort* or *military post* was beyond such control of the State, by taxation or otherwise, as would defeat its use for those purposes. So far as the *land constituting the Reservation was not used for military purposes,* the possession of the United States was only that of an *individual proprietor.*" And again on page 538 (269 of L. Ed.), the Court, quoting from Story's Commentaries on the Constitution, says: " 'If there has been no cession by the State of the place, although it has been constantly occupied and used under purchase, or otherwise, by the United States for a fort or arsenal, or other *constitutional purpose,* the *State jurisdiction still remains complete and perfect,*' and in support of this statement he refers to *People* vs. *Godfrey,* 17 Johns. 225. In that case the land on which Fort Niagara was erected, in New York, never having been ceded by the State to the United States, it was adjudged that the Courts of the State had

jurisdiction of crimes or offences against the laws of the State committed within the fort or its precincts, although it had been garrisoned by the troops of the United States and held by them since its surrender by Great Britain, pursuant to the treaties of 1793 and 1794. In deciding the case, the court said that the possession of the post by the United States must be considered as a *possession for the State, not in derogation of her rights,* observing that it regarded it as a fundemental principle that the rights of sovereignty were not to be taken away by implication. 'If the United States,' the Court added, 'had the right of exclusive legislation over the Fortress of Niagara they would have also exclusive jurisdiction; but we are of opinion that the right of exclusive legislation within the territorial limits of any State can be acquired by the United States only in the mode pointed out in the Constitution, *by purchase, by consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings.* The essence of that provision is that the State shall freely cede the particular place to the United States for one of the specific and enumerated objects. This jurisdiction cannot be acquired tortiously by disseisin of the State; much less can be acquired by mere occupancy, with the implied or tacit consent of the State, when such occupancy is for the purpose of protection.' "

This case contains a very able *resumé* of the law applicable to the proposition under consideration and we commend its careful reading. The doctrine therein de-

clared was again asserted in *Chicago etc. Ry. Co.* vs. *McGlinn*, 114 U. S. 542; 29 L. Ed.271, where the Reservation case is referred to, the Supreme Court, on page 545, saying: "But, in order that the United States may possess exclusive legislative power over the tract, except as may be necessary to the use of the building thereon as such instrumentality, they must have acquired the tract by purchase, with the consent of the State. *This is the only mode* prescribed by the Federal Constitution for their acquisition of exclusive legislative power over it."

In *Van Brocklin* vs. *Tennessee*, 117 U. S. 151,*167;* 29 L. Ed. 845, *850*, affirming the Fort Leavenworth Military Reservation case, the United States Supreme Court said: 'The *civil and criminal jurisdiction over the Reservation* had passed to the State upon its admission into the Union."

An interesting case on this subject is the Brooklyn Navy Yard case, reported as *Palmer et al.* vs. *Barrett*, 162 U. S. 399, 40 L. Ed. 1015, wherein the Fort Leavenworth Military Reservation case is followed and approved, and the jurisdiction of the United States over Brooklyn Navy Yard is denied by reason of the conditions imposed in the act of the State of New York ceding jurisdiction to the United States.

See, also, to same effect:

Sharon vs. *Hill*, 11 Sawy. 130; 24 Fed. R. 726, *731;*

In re Ladd, 74 Fed. R. 35;

State vs. *Mack*, 23 Nev. 363, 62 Am. St. Rep. 813, 47 Pac. 764;

United States vs. *Meagher*, 37 Fed. R. 878;
Crook etc. Co. vs. *Old Pt. etc. Hotel Co.*, 54 Fed. R. 608;
In re Kelly, 71 Fed. R. 549;
United States vs. *Partello*, 48 Fed. R. 677;
Benson vs. *United States*, 146 U. S. 330, 36 L. Ed. 994.

An apt illustration of how *political jurisdiction* is ceded by a State may be found in the statute of Kansas, quoted in the Fort Leavenworth Military Reservation, at page 528 (page 265 L. Ed.).

It ought to be clear, from the foregoing authorities, that the United States is but an *ordinary proprietor* of the lands owned by it within the confines of the Yosemite National Park.

Obviously, an ordinary proprietor could not dictate to his neighbor what he should do with his lands, nor impose any terms or restrictions or conditions as to the use or enjoyment to which his neighbor's lands should be put. Manifestly he could not impose upon such neighbor the burden of fencing his land, which is what the defendant seeks to compel the petitioner to do under and by virtue of the authority conferred upon him by the rules above referred to; nor could he force his neighbor to mark or define or point out his lands by metes and bounds, or otherwise, or at all, or place the slightest inhibition or restriction upon his free and unmolested

use of the public roads. As long as his neighbor was engaged in a lawful pursuit and putting his lands to lawful purposes, no complaint could be made.

At the very outset of rule 9, promulgated by the Secretary of the Interior for the government of the Yosemite National Park, and under which the defendant Benson, as military superintendent of the Park, seeks to act, it is solemnly recited that: "Owners of patented lands within the park limits are *entitled* to the *full use and enjoyment thereof.*" These are but mere empty words, if the Secretary of the Interior can make and enforce rules which, in the slightest degree, impair the "full use and enjoyment thereof."

It is true that on March 5, 1905, the State of California ceded to the United States the "Yosemite Valley" and the lands included in said act, but this, we contend, simply operated to convey to the United States the fee to the lands. It did not, and, we insist, in the absence of an express statutory enactment by the State of California ceding political jurisdiction to the United States, could not convey to the United States all political sovereignty and jurisdiction of the State of California over the lands within the confines of the Yosemite National Park, whether owned by the government or by private individuals.

On September 9, 1850, California was admitted into the Union "on an equal footing with the original States in all respects whatever." On June 30, 1864, the United States ceded to the State of California the "Yosemite Valley" and other adjacent lands. On October 1, 1890,

the United States created the Yosemite National Park, withdrawing from public entry a large body of public lands surrounding and contiguous to the "Yosemite Valley." During all these years from June 30, 1864, to the time of its recession to the United States, on March 3, 1905, the State had absolute title to, and exercised undisputed political sovereignty and jurisdiction over, the lands granted and now comprised within the confines of the Yosemite National Park. Taxes on all lands within the park owned by private parties were at all times and are to-day paid to the State. The petitioner, to this day, pays taxes on his lands within the park to the State of California. The record shows:

"(Mr. Woodworth). Q. Do you (the complainant) pay taxes on the land owned by you to the State of California?

"A. Yes." (page 36, Transcript of Record.)

If the State of California had ceded its political jurisdiction over all lands within the confines of the Yosemite National Park to the United States, it would have no right to collect taxes thereon.

Lowe vs. *Fort Leavenworth R. R. Co.*, 114 U. S. 525; 29 L. Ed. 264.

Chicago etc. Ry. Co. vs. *McGlinn*, 114 U. S. 542; 29 L. Ed.271.

It is respectfully submitted that the cession of its political jurisdiction on the part of the State of California cannot be inferred or implied from the mere fact of its recession to the United States of the "Yosemite Valley." The cession of political sovereignty and juris-

diction is an act of paramount and most solemn character, and, it is submitted, can only be exercised by a State through some affirmative statutory enactment.

People vs. *Godfrey*, 17 Johns. 225;

Lowe vs. *Fort Leavenworth R. R. Co.*, 114 *U. S.* 525; 29 L. Ed. 264.

Chicago etc. Ry. Co. vs. *McGlinn*, 114 U. S. 542; 29 L. Ed. 270.

From all that has been said, it follows that the rules and regulations of the Secretary of the Interior, in so far as they purport to affect the public roads or highways within the confines of the Yosemite National Park and the rights of owners of land within the park to the free use and enjoyment of their lands, are without legal authority and void.

It is not here denied that the Secretary of the Interior may make legal rules affecting the administration of the park lands; that is to say, those lands within the confines of the Yosemite National Park which the United States owns, but it cannot legislate as to lands within the park owned by individuals. It can no more dictate what the private owners of lands within the park shall do with their lands, or how, or on what terms, private owners shall use their lands, than could such private owners dictate to the United States what the latter should do with park lands owned by it. We do not dispute that the Secretary of the Interior may promulgate a rule inhibiting all persons from driving stock on *park lands*, that is, lands *owned* by the United States, unless a permit be first obtained. A private owner of lands within the park would have the same

right to require his permission before the stock of his neighbors or of strangers should be driven over his lands. But the Secretary of the Interior, the political sovereignty of the State of California not having been ceded to the United States, has no right to require a permit to drive stock over the public roads or highways within the park.

The Secretary of the Interior has no right to refuse to allow the owner of lands within the park to graze his cattle and horses upon his lands, because the owner of such lands does not wish or see fit, on account of expense or otherwise, to fence or enclose his lands, or even to mark or define or point out his lands by metes and bounds. The political sovereignty still being in the State of California, the rights of the United States and regulations and orders must be confined, strictly are simply those of an "ordinary proprietor", and it is impotent to legislate as to the rights of citizens owning lands within the confines of the park. That power still remains and inheres in the State of California.

However commendable the rules and regulations may be to protect and preserve the park as a place of pleasure and recreation, these rules can have no effect on or as to lands owned by private citizens, or as to public roads of the State. In brief, while the Secretary of the Interior has the undoubted right to place the park under military rule and to promulgate rules and regulations as to park lands, and even has the undoubted right to prevent any one from setting a foot on park lands of the United States, such military rules

speaking, to Government lands, and *cannot be enforced as to public highways or patented lands.*

If it be true that stock, driven on public roads within the park limits, will occasionally stray from the roads and trespass upon park lands, that is, lands owned by the United States, the Government has an adequate remedy in suits for damages for such trespasses; or, again, the United States could, by fencing its lands lying alongside the public roads, prevent any damage to its lands caused by straying stock.

If it be the fact that cattle and horses will roam from the unenclosed pastures of private owners within the confines of the park and trespass upon and do some damage to park lands, the Government has an adequate remedy at law; and, further, there is no reason preventing the Government from fencing its own lands instead of entailing this expense on the private owners of lands within the park limits.

On cross-examination, the defendant, H. C. Benson, testified:

"(Mr. Woodworth). Q. There is nothing to prevent the Government from fencing its own land, is there?

"A. Not that I know of." (Transcript of Record p. 41.)

There is no legal obligation retsing on the private owners of lands within the Yosemite National Park to fence their lands. As was well said in the case of *Bilen* vs.*Paisley,* 4 L. R. A. 840: "A person owning and occupying land is not vested with the right to enjoy it

upon condition that he enclose it by a palisade strong enough to keep his neighbors and their stock from breaking into and destroying the fruits of his labors. Property is not held in civilized communities by so insecure a tenure; but the law surrounds it by an ideal, invisible palladium, more potent than any mechanical paling which can be adopted in order to be in force."

It will be no answer, as was maintained at the oral argument by the United States Attorney, to claim that the enforcement of the rules herein involved would be for the betterment and protection of the park as such. The rights of citizens to use public roads or highways without question or hindrance, and to the free and uninterrupted use and enjoyment of their lands within the park are vested rights, far superior to the transitory pleasures and recreations that may be afforded by a public park.

THE RIGHT TO TRAVEL THE HIGHWAYS.

Section 2477 of the Revised Statutes of the United States provides: "The right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted."

It is admitted that every highway leading through the Yosemite National Park was constructed many years prior to the creation of the Park, and none of the lands now within the Park were, at the time when those roads were constructed, "reserved for public uses."

Under sec. 2618 of the Political Code of California, enacted in 1872—18 years before the Yosemite National Park was created by the United States—it was provided.

that: "In all counties of this State public highways are roads, streets, alleys, lanes, courts, places, trails and bridges, laid or erected as such by the public, or if laid out or erected by others, dedicated or abandoned to the public, or made as such in actions for the partition of real property."

That the right to regulate and control the use of such highways is a police regulation resting *solely in the State and not* in the *United States,* is squarely held by the United States Supreme Court in *New Orleans Gas Co.* vs. *Louisiana Light Co.,* 115 U. S. 650, and reasserted in *Jones* vs. *Brin,* 165 U. S. 182.

As all the roads which pass through the Park are toll-roads, the principle involved is the same, "for all toll roads are still public highways, the property in which pertains to the State."

Blood vs. *McCarty,* 112 Cal. 561, *564*;
People vs. *Davidson,* 79 Cal. 166;
Kellet vs. *Clayton,* 99 Cal. 210, *213*.

In the latter case it is said *'Every traveler* has the same right to use the road of a turnpike company, upon paying tolls established by law, that he has to use any other public highway."

Yet, notwithstanding such a plain and simple provision of the law, it is insisted by the defendant, as superintendent of the park, that no land owner therein can drive his stock along and on *those highways without* first getting the defendant's permission and

then being *escorted by a squad of soldiers.* Such a requirement is not only violative of the right to enjoy and use property in the manner one may desire, but is absolutely offensive.

Upon what theory of law can the Department of the Interior, or its officer, the Superintendent of the Park, enforce a rule compelling persons traveling public highways within the confines of the Park, to obtain written permission to use such public highways, in driving their stock to and from their patented lands within the confines of the Park?

The State of California has not ceded to the United States its political jurisdiction over its public highways.

It cannot make the slightest legal difference that some of these public highways are laid out or run through "Park lands." The "Park lands" may belong to the United States, but the public highways or public toll-roads running through these "Park lands" belong to the State of California until that sovereignty cedes its political jurisdiction over them to the United States.

This it has not as yet done.

To require the owners of patented lands within the Yosemite National Park to obtain written permission of the Park authorities before being allowed to use the public highways or public toll-roads, which give them and their stock access to their lands situate within the National Park, is to deny them their constitutional rights, and practically to confiscate their lands. For, if they cannot go and come at will with their stock to and from the lands owned by them within the confines of

the Park, a refusal by the park authorities to permit them to do so for the period of a month, a day, or even an hour, would mean a practical confiscation of their property.

It must be obvious that the operation of the Rule in question was intended to be confined to "Park lands," and not to public high-ways or toll-roads, or patented lands within the confines of the Park.

Undoubtedly, as to "Park lands," that is, lands owned by the United States, the Department of the Interior has the power to promulgate, and to enforce through its officers, rules requiring written permission before "stock may be taken over the *park lands* to patented lands." But such a rule, however effective and lawful it may be as to "Park lands," cannot be extended in its operation to private property—patented lands—or public high-ways or toll-roads, even though these may happen to be situated within the outside boundary lines of the Yosemite National Park.

These rules were intended to be, as shown by their context, and *should be* by the courts *limited* to the lands actually owned by the Government within the confines of the Yosemite National Park, and should not be extended in their operation to patented lands or public highways or toll-roads situate within the boundaries of the Yosemite National Park.

At any rate, we take it to be an established principle that such Rules are absolutely inoperative as to patented lands and the public highways or toll-roads within the confines of the Yosemite National Park until the State

of California cedes to the United States its political jurisdiction over such patented lands and public highways or toll-roads situate within the Yosemite National Park.

We respectfully submit that the only answer which the Respondents can offer to the argument we have made, is an Act of the Legislature of the State of California, ceding all its political jurisdiction and sovereignty over all patented lands and public highways or toll-roads situated within the confines of the Yosemite National Park.

But this, the State of California has not as yet seen fit to do. And, as the matter stands today, the State of California still retains complete political jurisdiction and sovereignty over all patented lands and public highways or toll-roads within the Yosemite National Park, and her citizens cannot be molested in their constitutional rights to use their patented lands for any lawful purpose vouchsafed by the laws of the State of California, and to use the public highways or toll-roads at will.

The petitioner's use of the lands owned and leased by him within the confines of the Yosemite National Park; to wit, the business of raising and grazing livestock—cattle and horses—is not unlawful or against public policy, but it is a lawful pursuit, the fostering of which should be strongly encouraged.

That the owners of patented lands situated within the confines of a national park shall have the full and free use and enjoyment thereof to pasture cattle and horses thereon, or put the same to any other lawful purpose,

and to travel freely and uninterruptedly the public highways leading thereto, are rights guaranteed by the Constitution of the United States and of each State, and neither Government, Federal nor State, can prescribe any conditions or restrictions upon the use of that property or of the public roads, so long as they are used for a lawful purpose.

If, in their uses, either the morals, health or safety of the public is involved, the police power of the *State* is the *sole* and *only* power which can interfere with such use

Such is, and always has been, and forever ought to be, the law of the land!

In order properly to understand and appreciate the argument herein advanced that the Department of the Interior has absolutely no power to make or enforce any rules respecting the use of private property or of public toll-roads within the State of California, when the State of California has not ceded its political jurisdiction to the United States over the particular private land or public toll-roads in controversy it may not be amiss briefly to review the historical conditions of our country, which led to the adoption of the Federal Constitution, so that those of its provisions applicable to the questions herein discussed may be interpreted in accordance with the intention of its framers.

In 1776, when this country was in the throes of war with England, the question as to what form of government should be adopted by the colonists, should they succeed in being freed from England's rule, was then

an important question.

It must be borne in mind, that at that time South Carolina had her slave laws, which were not granted to other colonies. Maryland had a charter guaranteeing religious freedom. Massachusets had her own laws, different from the other colonies, and so on with every other colony of the original Thirteen States. One colony could not interfere with laws or rights enjoyed by any other colony.

"For all the purposes of domestic and internal regulation, the colonial legislatures deemed themselves possessed of *entire* and *exclusive authority*. * * * The colonial legislatures, with the restrictions necessarily arising from their dependency on Great Britain, were *sovereign* within the limits of their respective territories. * * *

"Though the colonies had a common origin, and owed a common allegiance, and the inhabitants of each were British subjects, they had no direct political connection with each other. Each was independent of all the others; each, in a limited sense, was sovereign within its own territory. There was neither allegiance nor confederacy between them. The assembly of one province could not make laws for another, nor confer privileges which were to be enjoyed or exercised in another, further than they could be in any independent foreign state." (Tucker on the Const., Vol. 1, p. 199, sec. 120.)

While it is true that all the colonies desired to be freed from the yoke of British rule, yet none wished

to part with the rights otherwise enjoyed by them separately and individually. It was with a view to the preservation of their separate rights, that, in a Congress assembled in Philadelphia, on October 19, 1774, for the purpose of issuing an address to the King asking for an amelioration of the conditions under which the colonists were then suffering, it was

"Resolved: (6) That they are entitled to the benefit of such of the English Statutes, as existed at the time of their colonization, and which they have, by experience, respectively found to be applicable to their *several local* and other circumstances.

"Resolved: (7) That these, His Majesty's Colonies, are likewise entitled to all the immunities and privileges, granted and confirmed to them by Royal Charters, or secured by their *several* codes of Provincial Laws."

When their repeated petitions for amelioration and redress were unheeded, or were answered by additional and more severe impositions, the colonists again assembled at Philadelphia, in June, 1776, with a view of securing that freedom of thought and of action "and equal station to which the laws of nature and of nature's God entitle them," and, when secured, to have preserved to them that independence of each other, which they had hitherto enjoyed, and desired to continue to enjoy. They drafted the Declaration of Independence, the concluding words of which are "that these united colonies are, and of right ought to be, free and *independent* States."

On June 11, 1776, and before the colonists would

agree to the final adoption by Congress of the Declaration of Independence, it was resolved that "a committee be appointed to prepare and digest the form of a confederation to be entered into between these Colonies." That committee was appointed and the work of drafting the Articles of Confederation began. So apprehensive were the people of the several colonies that that *independence of each other and of the general government* might not be thoroughly and absolutely preserved, that it was not until July 9, 1778, that a satisfactory draft was finally completed. New Hampshire was the first Colony to subscribe to the Articles, which was done by her on August 8, 1778. Delaware never agreed to the Articles until February 1, 1779, and Maryland not until January 30, 1781, and the complete ratification by all the Colonies could not be announced by Congress until March 1, 1781. So, according to the history of our country, we find that, in its very formation, the sovereign independence of each State was one of the pillars upon which the fabric of this government was reared.

In the great case of *Ware* vs. *Hylton*, 3 Dall. 164, *224, 229*; I L. Ed. 568, *579*, it was distinctly held that the Declaration of Independence was of the independence of *each state*, and not of the states *collectively*.

Mr. Chief Justice Chase used the following language:

"On the fourth of July, 1776, following, the United States, in Congress assembled, declared the thirteen united colonies free and independent states; and that as

such, they had full power to levy war, conclude peace, etc. . . .

"I consider this as a declaration, not that the United Colonies jointly, in a collective capacity, were independent States, etc., but that each of them was a *sovereign* and *independent* state, that is, *that each of them had a right to govern itself by its own authority, and its own laws, without any control from any other power on earth.* * * *

"I entertain this general idea, that the several States retained *all internal sovereignty.*"

The Second Article of Confederation expressly provided that:

"Each State *retains its sovereignty, freedom and independence, and every power, jurisdiction and right,* which is not by this Confederation expressly delegated to the United States, in Congress assembled."

The above article has an all important bearing on the question under consideration, because it was the organic "law of the land" for ten years thereafter, to-wit: until 1789.

It is interesting to note that one of the necessities for a further revision of the articles of confederation and for a more complete and adequate Constitution for the Union arose principally out of the commerce conducted by George Washington upon the Ohio River. It seems that each State, through which his commerce was carried on, demanded the right to levy a tax, and, as such a condition was not contem-

plated by the framers of the Articles of Confereration, general dissatisfaction arose from the rights of the different States or Colonies to levy such tax.

In this state of affairs, commissioners were appointed by the legislatures of Virginia and Maryland, early in 1785, to form a compact relative to the navigation of the rivers Potomac and Pocomoke, and the Chesapeake Bay. The meeting of these commissioners led the legislature of Virginia to pass a resolution to lay the subject of tariff before all the States composing the Confederation.

Soon after, another and a broader resolution was adopted by Virginia, and the resolutions were communicated to the different States, and a convention of commissioners from but five States, namely, New York, New Jersey, Pennsylvania, Delaware and Virginia, met at Annapolis in September, 1786.

This meeting resulted in a report to be laid before the several States as well as before Congress. In this report, the appointment of commissioners from all the States was recommended, "to meet at Philadelphia on the second Monday of May, the next, to take into consideration the situation of the United States, to devise such further provisions as shall appear to them necessary to render the Constitution of

the Federal Government adequate to the exigencies of the Union." Thereafter, on February 21, 1787, a resolution was also adopted in Congress recommending a convention to meet in Philadelphia, on the second Monday of May ensuing, "for the purpose of revising the Articles of Confederation, and reporting to Congress and the several legislatures such alterations and provisions therein, as shall, when agreed to in Congress and confirmed by the States, render the Federal Constitution adequate to the exigencies of government and the preservation of the Union."

At the time and place appointed, the representatives of twelve States assembled. Rhode Island alone declined to appoint any on that occasion.

As a result, the Federal Constitution was prepared and adopted in 1788.

In the original draft of the Constitution, the recital of the reservation of State sovereignty was omitted. But afterwards this was expressly reserved by the Tenth Amendment to the Constitution, adopted on September 25, 1789, in and by which amendment it was provided that:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are *reserved to the States respectively, or to the people.*"

It is a well-settled canon of constitutional interpretation that the Federal Government is one of *enumerated powers,* the Constitution being the measure thereof, and the powers not delegated thereby being reserved to the individual States or to the people.

Gibbons vs. *Ogden*, 9 Wheat. 1; 6 L. Ed. 23.

Martin vs. *Hunter*, 1 Wheat. 304; 4 L. Ed. 97.

McCulloch vs. *Maryland*, 4 Wheat. 316, 402 to 405.

Spooner vs. *McConnell*, 1 McLean 337.

Rhode Island vs. *Mass.*, 12 Pet. 730.

"The Government, then, of the United States can claim no powers which are not granted to it by the Constitution; and the powers actually granted must be such as are expressly given, or given by necessary implication."

Martin vs. *Hunter*, 1 Wheat. 304, *326*; 4 L. Ed. 97, *102*.

Gibbons vs. *Ogden*, 9 Wheat. 1; 6 L. Ed. 23.

In the case of the United States vs. Cruikshank, 92 U. S. 542; 23 L. Ed. 588, Mr. Chief Justice Waite used the following emphatic language:

"The Government of the United States is one of delegated powers alone. Its authority is defined and limited by the Constitution. All powers not granted to it by that instrument are *reserved to the States or the people.*"

The entire subject is thus summed up in Tucker on the Constitution, Vol. 2, page 690:

"First—The Federal Government has no powers but those delegated by the Constitution. It has no inherent powers, but only those derived from the Constitution as delegated or granted by necessary implication.

"Second—Those not so delegated, unless prohibited to the States, are *reserved to the States respectively, or*

to the people.

"*Reservation of powers* is the basis of the title of the States or of the people of the States to *political powers* under the Constitution. They are not secured to the States or to the people by virtue of the Constitution; they are inherent in the people of the States, and unless delegated to the United States, or by their constitutional act prohibited to themselves, they remain with the States respectively and the people. The word '*reserved*' in the Constitution is synonymous with the word '*retained*' in the Confederation.

"This amendment, therefore, differentiates the powers of the United States and the powers of the States. The former are derived by the United States through delegation from the States. The latter, *the reserved powers, remain in and are retained by the States,* because not delegated or prohibited."

As was said by the United States Supreme Court in *Ableman* vs. *Booth,* 62 U. S. 506; 16 L. Ed. 169, *176,* we have, in this country, a "complex character of government, and the existence of two distinct and separate sovereignties, within the same territorial space, each of them restricted in its powers, and each within its sphere of action, prescribed by the Constitution of the United States, *independent of the other.*"

This brief historical reference to the Declaration of Independence, the 2nd Article of Confederation, and the 10th Amendment to the Constitution, clearly establishes that it is the organic law of this country that, "with the exception of the powers surrendered by the

Constitution of the United States, the people of the several States are *absolutely and unconditionally sovereign within their respective territories.*"

Ohio Life Ins. Co. vs. *De Bolt*, 16 How. 416, *428*; 14 L. Ed. 997, *1002*.

And in the case of *Buffington etc.* vs. *Day*, 11 Wall. 113; 20 L. Ed. 122, *125*, it was said:

"It is a famiilar rule of construction of the Constitution of the Union, that the sovereign powers vested in the State governments by their respective Constitutions, remained unaltered and unimpaired, except so far as they were granted to the Government of the United States. That the intention of the framers of the Constitution in this respect might not be misunderstood, this rule of interpretation is expressly declared in the Tenth Article of the Amendments, namely: 'The powers not delegated to the United States are reserved to the States respectively, or to the people.' The Government of the United States, therefore, can claim *no powers* which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication.

"The General Government, and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former, in its appropriate sphere, is supreme; but the States within the limits of their powers, not granted, or, in the language of the Tenth Amendment, 'reserved,' *are as independent* of the Gen-

eral Government as that Government within its sphere is independent of the States."

We now turn to the all-important question of *what powers were reserved to the States* by the Second Article of Confederation, while it remained in force, and afterwards by the Tenth Amendment of the Federal Constitution.

It seems now beyond question that the "police power"—by which is meant the internal administration of the States—was reserved to the States in the Second Article of Confederation and in the Tenth Amendment to the Constitution of the United States.

The Supreme Court of the United States, in the case of *United States* vs. *DeWitt,* 9 Wall. 41; 19 L. Ed. 593, held squarely that, by the reservation to the States contained in the Federal Constitution, Congress has no power to make or enforce any rule or law which is in its nature a *police regulation,* the operation of which is confined to one State, as the police power, when confined to a State, *belongs solely to the State.*

Again, in the case of Patterson vs. Kentucky, reported in 97 U. S. 501; 24 L. Ed. 1115, affirming the doctrine laid down in the case just cited, the Court said:

" 'In the American constitutional system,' says Mr. Cooley, 'the power to establish the ordinary regulations of police has been left with the individual States, and cannot be assumed by the National Government.' (Cooley, Const. Lim., 574). While it is confessedly difficult to mark the precise boundaries of that power,

or to indicate, by any general rule, the exact limitations which the States must observe in its exercise, the existence of such a power in the States has been uniformly recognized in this Court. (*Gibbons* vs. *Ogden*, 9 Wheat. 1; License Cases, 5 How. 504; *Gilman* vs. *Philadelphia*, 3 Wall. 713; *Henderson* vs. *Mayor of N. Y.*, 92 U. S. 259; *R. R. Co.* vs. *Husen*, 5 Otto 465; *Beer Co.* vs. *Mass.*, 7 Otto 25.) It is embraced in what Mr. Chief Justice Marshall, in Gibbons v. Ogden, calls that 'immense mass of legislation' which can be most advantageously exercised by the States, and over which the national authorities cannot assume supervision or control."

As said by the United States Supreme Court in *Prigg* vs. *Pennsylvania*, 16 Peters 625; 10 L. Ed. 1060, *1092*:

"To guard, however, against any possible misconstruction of our views, it is proper to state that we are by no means to be understood in any manner whatsoever to doubt or to interfere with the police power belonging to the States in virtue of their sovereignty. That police power extends over *all* subjects within the territorial limits of the States, and *has never been conceded to the United States.*"

The United States Supreme Court, in the case of *United States* vs. *Knight*, 156 U. S. 1, *13*; 39 L. Ed. 325, *329*, said:

"It is vital that the independence of the commercial power and of the police power, and the delimitation between them, however sometimes perplexing, should

always be recognized and observed, for while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the States as required by our dual form of government; and acknowledged evils, however grave and urgent they may appear to be, had better be borne, than the risk to be run, in the effort to suppress them, of more serious consequences by resort to expedients of even doubtful constitutionality."

Again and again has the Supreme Court of the United States reaffirmed that the police power—the right to administer their own internal affairs—was reserved to the States. A few of the leading cases are here set forth:

Patterson vs. *Kentucky*, 97 U. S. 501;
Barbier vs. *Connolly*, 113 U. S. 27;
Minegler vs. *Kansas*, 123 U. S. 623;
Ry. Co. vs. *Mackey*, 127 U. S. 205;
Holden vs. *Hardy*, 169 U. S. 366;
St. Louis etc. Ry. Co. vs. *Paul*, 173 U. S. 404;
Tullis vs. *Ry. Co.*, 175 U. S. 348;
Gundling vs. *Chicago*, 177 U. S. 183;
Knoxville Iron Co. vs. *Harbison*, 183 U. S. 13;
Atkins vs. *Kansas;* 191 U. S. 207;
Jacobson vs. *Massachusetts*, 197 U. S. 11;
Minnesota Iron Co. vs. *Kline*, 199 U. S. 593;
Western Turf Ass. vs. *Greenberg*, 204 U. S. 359.

It has also decided time and again that the 13th, 14th, or 15th Amendments to the Constitution do not

impair the supremacy of the "police power" reserved to the States.

Barbier vs. *Connolly, supra;*

Hodges vs. *United States,* 203 U. S. 6, *8.*

Mr. Justice Brewer, in the case of Hodges vs. United States, *supra,* in referring to the 13th, 14th, and 15th Amendments of the Constitution, aptly stated the now well-settled doctrine that: "Notwithstanding the adoption of these three amendments, the National Government still remains one of enumerated powers, and the Tenth Amendment, which reads: 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, *are reserved to the States respectively, or to the people,*' it is not shorn of its vitality."

It follows, from what has been said, that Congress has no power to pass an act which is in its nature a police regulation, the operation of which is limited to the people of a State, and the Secretary of the Interior is without power to make any rules regarding the Yosemite National Park, which in effect operate as police regulations on the citizens of the State of California or purport to affect in any way the enjoyment by them of their lands in that State, within the Park.

No conditions whatever can be imposed upon the owners of patented lands in the Yosemite National Park, so long as those lands are used for a lawful purpose, and if not used for a lawful purpose, their use for such purpose can only be limited by the *law* and *law officers of the State of California.*

Neither Congress nor the Secretary of the Interior has the authority to make or enforce a rule compelling the owners of lands within the Yosemite National Park to fence their lands or even to "have the metes and bounds thereof so marked and defined as that they may be readily distinguished from the park lands," or to say to what extent, or how, or in what manner, or at all, patented lands of citizens and residents within the State shall be used.

To do so, would be for the Federal Government to arrogate to itself an unlawful exercise of the police power of the State.

Until the State of California *cedes political jurisdiction over the Yosemite National Park to the United States, every foot of territory therein and every person therein is subject to the laws of the State of California, and to none other.* Until then the rights of the United States in and to the park lands are simply those of an "ordinary proprietor."

The Fort Leavenworth Case, 114 U. S. 525; 29 L. Ed. 264.

If any "ordinary proprietor" should say to his adjoining owner that before you can use your lands "such lands, however, shall have the metes and bounds thereof so marked and defined so that they may be readily distinguished from the park (my) lands," and then say, as the superintendent of the park annually says, to what extent such land and the property thereon may be used, and attempt to enforce such authority by means of squads of soldiers under his command, he would find

the strong arm of the law so tightly throttling him, that he would cry for the breath of freedom so cherished in this country.

This brings us to the

SECOND BRANCH OF OUR ARGUMENT.

If Congress has any power of exclusive legislation within the confines of, or limited in its operation to, any one State, then such power must be found in the Federal Constitution, and must necessarily constitute an exception to the general fundamental doctrine above stated.

The only exception provided for by the Constitution is to be found in Article 1, section 8, subdivision 17, wherein it is provided that "Congress shall have power * * * to exercise *exclusive legislation* in all cases whatsoever over such district (not exceeding ten miles square), as may, by cession of particular States, and the acceptance of Congress, become the seat of the Government of the United States, and to *exercise like authority*, over all places purchased by the consent *of the Legislature of the State in which* the same shall be for the erection of forts, magazines, arsenals and dock yards and other needful buildings."

But, even under this exception provided for by the Constitution, the question of the right of the Secretary of the Interior to make or enforce a police regulation within the Yosemite National Park is easy of solution, and the power denied for the following additional reason:

That, as the Constitution of the United States gives exclusive jurisdiction to Congress over lands used for "forts, magazines, arsenals and dock-yards and other needful buildings," *when acquired in the method therein prescribed,* it cannot be seriously contended that the Yosemite National Park is either a fort, magazine, arsenal, dock-yard or other needful building.

Prior to the adoption of the constitutional provision just quoted (Art. I, sec. 8, subd. 17), the Federal Government did not even have legislative jurisdiction over the lands upon which were situate the buildings used for the administration of the United States, and the reasons for the adoption of that provision in the Federal Constitution are concisely stated by the United States Supreme Court in the Fort Leavenworth case, 114 U. S. 525, *529*; 29 L. Ed. 264, *266*, wherein it says:

"The necessity of supreme legislative authority over the seat of government was forcibly impressed upon the members of the Constitutional Convention by occurrences which took place near the close of the Revolutionary War. At that time, while Congress was in session in Philadelphia, it was surrounded and insulted by a body of mutineers of the Continental Army. In giving an account of this proceeding, Mr. Rawle, in his treatise on the Constitution, says of the action of Congress: 'It applied to the executive authority of Pennsylvania for defense; but, under the ill-conceived Constitution of the State at that time, the executive power was vested in a council, consisting of thirteen members,

and they possessed or exhibited so little energy, and such apparent intimidation, that the Congress indignantly removed to New Jersey, whose inhabitants welcomed it with promises of defending it. It remained for some time at Princeton without being again insulted, till, for the sake of greater convenience, it adjourned to Annapolis. The general dissatisfaction with the proceedings of the executive authority of Pennsylvania and the degrading spectacle of a fugitive Congress, suggested the remedial provisions now under consideration.' (Rawle, p. 113.)"

The Federal Government never heretofore observed any deficiency in the provisions of the Constitution, and it never was the intention of the framers of that instrument that the Federal Government should engage in the business of establishing "pleasure parks" in the different States. Such enterprises fall within what Mr. Chief Justice Marshall called that "immense mass of legislation" "which can be most advantageously exercised by the States, and over which the national authorities cannot assume supervision or control."

Patterson vs. *Kentucky*, 97 U. S. 501, *503*; 24 L. Ed. 1115.

The creation and maintenance of pleasure parks fall within the "police power," and such power is reserved to the States; and, therefore, the Federal Government cannot claim that there is any implied power of legislation to justify its rules here under consideration, because the power to establish and maintain parks was never granted to it by the States, and parks are not in-

struments of government, and we think it well settled that the Federal Government cannot exercise within the limits of a State any power or authority which is not incident to some power delegated to the Federal Government.

Kohl vs. *United States*, 91 U. S. 367;
United States vs. *Fox*, 94 U. S. 315;
Van Brocklin vs. *Tennessee*, 117 U. S. 151;
Cherokee Nation vs. *Southern Kansas Ry.*, 135 U. S. 641;
Shoemaker vs. *United States*, 147 U. S. 282.

The petitioner is not, in any manner, attacking the validity of the Act of Congress withdrawing public land from sale or disposition. Congress undoubtedly has that power, but petitioner does contend that both Congress and the Secretary of the Interior are without power to make and enforce rules for the management of a park, if those rules infringe upon the constitutional rights of property owners living within that park, or people traveling upon the highways leading through the park.

It does not appear from the pleadings or the agreed statement of facts, nor could it be contended for an instant, that the vacant lands within that park are used for any instrument of government.

No fort, magazine, arsenal, dockyard, or public building is claimed to be upon the lands adjacent to any patented lands within that park. Therefore, no impairment of any governmental function is

had in declaring the rules of the Interior Department void as not being within the power of Congress to delegate the authority to promulgate such a rule. It, therefore, follows that, in the absence of a cession of jurisdiction by the State of California, Congress has no more right of legislation, and the Secretary of the Interior no more power to make rules, over that territory than has any "ordinary proprietor."

Without desiring to prolong this already somewhat lengthy brief, it may not be amiss to advert briefly to two other subordinate propositions.

UNREASONABLENESS OF RULES 9 AND 10.

But even, for the sake of argument, if it were conceded that the Federal Government had authority to make regulations affecting the use of *private property* in the Yosemite National Park, such regulations must of necessity fall within the "police power," and be police regulations, and, unless it appear from the face of the rules that their enactment was for the protection of "the health, safety, or comfort of the public," they cannot be said to be valid or any police regulations, and the rules here under consideration would fall as not being "police regulations."

"Under the pleading, the ordinance amounts to the interdiction of a lawful business in the face of the fact that there is no impairment of, or danger to, either the health, safety, convenience or comfort of the public. It, therefore, is an unwarranted and arbitrary prohibition, and an ordinance which arbitrarily prohibits a lawful calling, without endeavor to regulate, is un-

reasonsable and should be declared void."

Hume vs. *Laurel Hill Cemetery et al.*, 142 Fed. R. 552.

This case also decides that the courts have the power to review the acts of the body making such regulations, and holds that municipal by-laws and ordinances, and even legislative enactments, undertaking to regulate useful business enterprises, are subject to investigation in the courts with a view to determining whether the law or ordinance is a lawful exercise of the police power, or whether, under the guise of enforcing police regulations, there has been an unwarranted and arbitrary interference with the constitutional rights to carry on a lawful business, to make contracts, or to use and enjoy property.

Under the act creating this park, all the lands therein owned by the Government are "withdrawn from sale or disposition." As the public is forbidden t ouse any lands adjacent to the lands of petitioner, it cannot be said that petitioner's use of his lands, for a lawful, useful and necessary purpose, in any manner affects public health, safety or morals, and, therefore, the rules attempting to interfere with the use of his lands, in the manner prescribed herein, are without the sanction of the law as police regulations.

SUIT MAY BE MAINTAINED AGAINST UNITED STATES OFFICERS.

That suit may be prosecuted against an officer of the United States for exceeding his authority, or for acting under a void power, or for trespass upon private prop-

erty, is now well settled law.

The leading case on that subject is *United States* vs. *Lee*, 106 U. S. 196; 27 L. Ed. 171, *182*, where it was said:

"No man in this country is so high that he is above the law. No officer of the law may set that law at defiance, with impunity. All the officers of the Government, from the highest to the lowest, are creatures of the law and are bound to obey it.

It is the only supreme power in our system of government, and every man who, by accepting office, participates in its functions, is only the more strongly bound to submit to that supremacy and to observe the limitations which it imposes upon the exercise of the authority which it gives.

Courts of justice are established not only to decide upon the controverted rights of the citizens as against each other, *but also upon rights in controversy between them and the Government*, and the docket of this Court is crowded with controversies of the latter class.

Shall it be said, in the face of all this, and of the acknowledged right of the judiciary to decide, in proper cases, statutes which have been passed by both branches of Congress and approved by the President, to be unconstitutional, that the courts cannot give remedy when the citizen has been deprived of his property by force, his estate seized and converted to the use of the Government without any lawful authority, without any process of law, and without any compensation, because the President has ordered it and his

officers are in posession?

If such be the law of this country, it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well-regulated liberty and the protection of personal rights.

It cannot be, then, that when, in a suit between two citizens for the ownership of real estate, one of them has established his right to the possession of the property according to all the forms of judicial procedure, and by the verdict of a jury and the judgment of the court, the wrongful possesor can say successfully to the court: *Stop here; I hold by order of the President, and the progress of justice must be stayed.* That, though the nature of the controversy is one peculiarly appropriate to the judicial function; though the United States is no party to the suit; though one of the three great branches of the Government, to which by the Constitution this duty has been assigned, has declared its judgment after a far trial, the unsuccessful party can interpose an absolute veto upon that judgment by the production of an order of the Secretary of War, which *that officer had no more authority to make than the humblest private citizen.*"

These remarks are peculiarly apposite to the case at bar. We contend that the Secretary of the Interior was absolutely without power to make any rules or regulations which might affect or limit the rights of citizens to the use of their lands or of public roads within the limits of the park. The power under which the defendant Benson, as military superintendent of the park,

seeks to act and enforce these obnoxious rules, is unconstitutional and void.

The opinion in the above case continues as follows:

"If it be said that the proposition here established may subject the property, the officers of the United States, and the performance of their indispensable functions, to hostile proceedings in the State courts, the answer is, that no case can arise in a State court, where the interests, the property, the rights or the authority of the Federal Government may come in question, which cannot be removed into a court of the United States under existing laws. In all cases, therefore, where such questions can arise, they are to be decided, at the option of the parties representing the United States, in courts which are the creation of the Federal Government."

The present suit was begun in the State Court in and for Tuolumne County, and afterwards removed to the Federal Court.

It has been held that the exemption of the United States, and of the several States, from judicial process does not protect their officers and agents, civil or military, in time of peace, from being personally liable to an action by a private person whose rights of property they have wrongfuly invaded or entered, even by authority of the Government they represent.

Little vs. *Barreme,* 2 Cranch 190; 2 L. Ed. 243;

Osborn vs. *Bank of U. S.,* 9 Wheat. 738; 6 L. Ed. 204;

Bates vs. *Clark,* 95 U. S. 204; 24 L. Ed. 471;

Pennoyer vs. *McConnaughy*, 140 U. S. 1; 35 *L. Ed.* 363;

Buck vs. *Colboth*, 70 U. S. 334; 18 L. Ed. 257;

Beckwith vs. *Bean*, 98 U. S. 304; 25 L. Ed 124;

Etheridge vs. *Sperry*, 139 U. S. 266; 35 L. Ed. 171;

Mitchell vs. *Harmony*, 54 U. S. 115; 14 L. Ed. 75.

Numerous actions have been maintained against customs officials for exacting illegal or excessive duties,

Elliott vs. *Swartwout*, 10 Pet. 137; 9 L. Ed. 373.

Against executive officers for making illegal or tortious seizures of property.

Osborn vs. *Bank of U. S.*, 9 Wheat. 738; 6 L. Ed. 204.

Against tax collectors for seeking to enforce a void tax law.

Poindexter vs. *Greenhow*, 114 U. S. 270; 29 L. Ed. 185.

An action has been maintained against a Postmaster for withholding a newspaper in accordance with instructions from the Postmaster-General.

Teal vs. *Felton*, 1 N. Y. 537; 49 Am. Dec. 352; affirmed in 12 How. 284; 13 L. Ed. 990.

An action for false imprisonment has been held to lie against the sergeant-at-arms of the House of Representatives who acted under a void warrant of commitment issued by the House.

Kilbourn vs. *Thompson*, 103 U. S. 168; 26 L. Ed. 377.

Actions of ejectment have been maintained against Government officers in possession of land under Government authority.

Tindel vs. *Wesley*, 167 U. S. 204; 42 L. Ed. 137.
U. S. vs. *Lee*, 106 U. S. 196; 27 L. Ed. 171;
Cunnnigham vs. *Macon and B. R. Co.*, 109 U. S. 446; 27 L. Ed. 992;
Stanley vs. *Schwalby*, 147 U. S. 508; 37 L. Ed. 259;
Smyth v. *Ames*, 169 U. S. 466, *518*, *519*; 42 L. Ed. 819.

And such actions have been maintained in the State courts.

Polock vs. *Mansfield*, 44 Cal. 36;
King vs. *La Grange*, 61 Cal. 221.

That, in proper cases, injunctions can be obtained against such officers is equally well established.

Pennoyer vs. *McConnaughy*, 140 U. S. 1; 35 L. Ed. 363;
In re Tyler, 149 U. S. 164; 37 L. Ed. 689;
Scott vs. *Donald*, 165 U. S. 58; 41 L. Ed. 632;
Scott vs. *Donald*, 165 U. S. 107; 41 L. Ed. 648;
Tindal vs. *Wesley*, 167 U. S. 204; 42 L. Ed. 137;
Am. School of Magnetic Healing vs. *McAnnulty*, 187 U. S. 94; 47 L. Ed. 90.
High on Injunctions, secs. 1308, *1309*.

An injunction will be granted against public officers to prevent a breach of trust affecting public franchises or some illegal action under color or claim of right affecting injuriously the property rights of individuals

or the public, or where serious injury will result to private individuals without corresponding public benefit, or to prevent multiplicity of suits.

Mott v. *Pa. R. R. Co.*, 30 Pa. St. 9;
Green vs. *Green*, 34 Ill. 320;
Green vs. *Muniford*, 5 R. I. 472;
New London vs. *Brainard*, 22 Conn. 553;
Brown vs. *Trustees of Catlettsburg*, 11 Bush 435;
Collins vs. *Ripley*, Clark 129;
Cooper vs. *Alden*, Harrington Ch. 72;
Atty.-Gen. vs. *Forbes*, 2 My. & Cr. 123;
People vs. *Canal Board*, 55 N. Y. 390;
People vs. *Albany*, 55 Barb. 344;
Mahawk etc. vs. *Aitcher*, 6 Paige 83;
Oakley vs. *Trustees*, 6 Paige 262;
Green vs. *Oakes*, 17 Ill. 294;
Bradley vs. *Comins*, 2 Humph. 428;
Avery vs. *Fox*, 1 Abb. U. S. 246;
Pope vs. *Halifax*, 12 Cush. 411.

In the case of *Pennoyer* vs. *McConnaughy*, 140 U. S. 1, *10*; 35 L. Ed. 363, *365*, it was said:

"Such suit, whether brought to recover money or property in the hands of such defendants, unlawfully taken by them in the behalf of the State, or for compensation in damages, or, *in a proper case, where the remedy at law is inadequate, for an injunction to prevent such wrong and injury*, or for a mandamus, in a like case, to enforce upon the defendant the performance of a plain legal duty, purely ministerial, is not, within the meaning of the 11th amendment, an action against the State."

This doctrine was reaffirmed *In re Tyler*, 149 U. S. 164, *190*; 37 L. Ed. 689, *691*.

In *Tindal* vs. *Wesley*, 167 U. S. 204, *222*; 42 L. Ed. 137, *143*, it was said:

"If a suit against officers of a State, to *enjoin them from enforcing an unconstitutional statute*, whereby the plaintiff's property will be injured, or to recover damages for taking under a void statute the property of the citizen, be not one against the State, it is impossible to see how a suit against the same individual to recover the possession of property belonging to the plaintiff, and illegally withheld by the defendants, can be deemed a suit against the State. Any other view leads to this result: That if a State, by its officers, acting under a void statute, should seize, for public use, the property of a citizen, without making or securing just compensation for him, and thus violate the constitutional provision declaring that no State shall deprive any person of property without due process of law (*Chicago etc. R. Co. vs. Chicago*, 166 U. S. 2; 226, *236-241*) the citizen is remediless so long as the State, by its agents, chooses to hold his property; for, according to the contention of the defendants, if such agents are sued as individuals, wrongfully in possession, they can bring about the dismissal of the suit by simply informing the court of the official character in which they hold the property thus illegally appropriated."

This language is directly applicable to the case at bar. We desire to enjoin unconstitutional and void rules and regulations of the Department of the Interior made and

promulgated under the ostensible power conferred on that Department by the act of Congress of October 1, 1890.

In the case of *American School of Magnetic Healing* vs. *McAnnulty*, 187 U. S. 94, *108*, *109*; 47 L. Ed. 90, *96*, the following language was used:

"The acts of all its officers must be justified by some law, and in case an official violated the law to the injury of an individual the courts generally have jurisdiction *to grant relief* * * * The facts, which are here admitted of record, show that the case is not one which, by any construction of those facts, is covered or provided for by the statutes under which the Postmaster-General has assumed to act, and his determination that those admitted facts do authorize his action is a clear mistake of law as applied to the admitted facts, and the courts, therefore, must have power in a proper proceeding *to grant relief. Otherwise, the individual is left to the absolutely uncontrolled and arbitrary action of a public and administrative officer, whose action is unauthorized by any law, and is in violation of the right of the individual. Where the action of such an officer is thus unauthorized, he thereby violates the property rights of the person whose letters are withheld.*"

And the United States Supreme Court held in that case that *injunction* was the proper remedy.

This decision is directly applicable to the relief sought here. We maintain that the defendant Benson, and the soldiers under his orders, are acting under authority which is void, the rules and regulations of the

Department of the Interior being invalid and unconstitutional in the several particulars already enlarged upon in this brief.

In the case of *State of Ohio* vs. *Chase*, 5 Ohio St. 529, it was said:

"Under our system of government *no officer is placed above the restraining authority of the law*, which is truly said to be universal in its behest, all paying it homage, the least as feeling its care, and *the greatest as not being exempt from its power.*"

RÉSUMÉ.

From the foregoing argument and the authorities cited in support thereof, it is respectfully submitted:

1st. That the Honorable Secretary of the Interior has no power or authority to make or enforce the rules and regulations herein involved, or any rule or regulation purporting to affect or impair or restrict or place any condition whatever upon the rights of persons owning patented lands within the Yosemite National Park to the free use and enjoyment of their lands or the free and unmolested use of the public roads within the confines of the park; and that the defendant Benson and the other defendants, soldiers acting under his command, cannot act in obedience to any rule of the Department of the Interior, when, in so doing, they violate the rights of petitioner.

2nd. That the petitioner has the absolute right, without let or interference or hindrance from any of the defendants, or any other officer or agent of the United States, to use his own lands for any lawful purpose and

to travel the public highways leading thereto without asking permission from the defendants or any one else connected with the Federal Government.

3rd. That petitioner is entitled to an injunctional decree as prayed for in his bill of complaint herein.

4th. That the judgment and decree of the Honorable Circuit Court of the United States, Ninth Circuit, in and for the Northern District of California, should be reversed and the petitioner granted the relief prayed for in his bill of complaint herein.

Respectfully submitted,

MARSHALL B. WOODWORTH,
Solicitor for Complainant;
and
JOHN B. CURTIN,
In propria persona.

JOHN B. CURTIN,
In propria persona,
Of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1911

J. B. CURTIN
vs.
H. C. BENSON, *et al*
} No. 1.

BRIEF OF ARGUMENT FOR APPELLANT.

This is a suit to restrain the Superintendent of the Yosemite National Park, Major Benson, of the United States Army, and soldiers under his command, from interfering with the use by the appellant, for grazing purposes, of certain lands owned or leased by him, and the driving of cattle to said lands on the public tollroads leading thereto.

The defense was, in effect, justification, that the appellant's lands were within the exterior boundary of the Yosemite National Park and the appellant had refused to comply with the following regulations prescribed by the Secretary of the Interior under date of April 22, 1905:

> 9. Owners of patented lands within the park limits are entitled to the full use and enjoyment thereof; such lands, however, shall have the metes and bounds thereof so marked and defined as that they may be readily distinguished from the park lands. Stock may be taken over the park lands to patented lands with the written permission and under the supervision of the superintendent.
>
> 10. The herding or grazing of loose stock or cattle of any kind on the Government lands in the park, as well as the driving of such stock or cattle over the same, is strictly forbidden, except in such cases where authority therefor is granted by the superintendent.

Major Benson construed these regulations,

First, as imposing upon the owners of patented land the burden of marking and defining the metes and bounds thereof (or, rather, agreeing with him as to boundaries);

Second, that the driving of cattle over and along public tollroads within the exterior boundary of the National Park is taking stock "over the park lands" or "over the Government land in the park"; and

Third, that the privilege of so using such public tollroads and grazing cattle on his own patented lands is dependent upon compliance by the appellant with the assumed requirement regarding boundaries;

And upon refusal by the appellant, Major Benson drove off from appellant's patented lands cattle which the appellant had thereon and has continued by force to prevent the appellant from driving cattle over the public tollroads to his lands or grazing his cattle thereon irrespective of the manner in which he might get them there.

The fundamental question argued by the appellant and the Government is whether or not the Federal Government can impose any burden upon the owner of patented land within the exterior boundary of the Yosemite National Park in the use of his land or the use of public tollroads leading thereto.

The Court, however, will inquire whether such question is presented by the record, that is, whether the regulations in question undertake to impose the assumed burden upon owners of patented land in the use thereof or in the use of public tollroads leading thereto, and, if so, whether such regulations, so construed, are reasonable and appropriate.

THE REGULATIONS IN QUESTION ARE NOT SUSCEPTIBLE OF THE CONSTRUCTION AND EFFECT CLAIMED BY THE APPELLEE.

These regulations are not in form or terms directed to the control of the use or enjoyment of private patented

lands, but are instructions to the Superintendent of the park with respect to the passage of stock over, or the grazing thereof on, the Government lands in the park.

The first clause is an unqualified recognition of the right of owners to the use and enjoyment of patented lands within the park boundary. The next clause is a mere direction that the metes and bounds of private lands, that is to say, the boundaries between private and Government land, shall be so marked and defined as that the private land may be readily distinguished from the park land. It does not undertake to require that the owners of private lands shall mark the boundaries, but is reasonably subject only to the interpretation that the park authorities shall themselves do the requisite marking and defining of boundaries.

Counsel for Major Benson concede that the status of the Government with respect to boundaries is only that of a private owner and that the common law controls, but, from the principle that the United States is not dependent upon the State government for protection against trespass and may prevent trespass or remove trespassers by force, or punish trespassers in criminal proceedings in its own courts, submits the conclusion that the United States may anticipate trespass and by regulation require private owners to fence their lands to prevent their stock from straying on to the Government land, and, the greater including the less, may, therefore, merely require private owners to mark the boundaries between their lands and the Government lands in order that the Government may more readily observe if cattle are trespassing; and that, as a penalty for failure to comply with such regulation, it may, by the force of its Army, prevent a private owner from using his land; and that the Government, by the regulations in question, has cast such burden upon the private owner with such consequent practical confiscation of his land.

Such violent inroad upon the right of property is at-

tempted to be constructed by inserting in regulation nine words which are not there and which are not necessary to the reasonable interpretation thereof. And the consequences are so extraordinary as to repel the construction attempted and require the obvious interpretation of this regulation as merely directing the officers of the park to do such marking and defining of boundaries as may be deemed necessary.

In any event, the language used is too ambiguous, uncertain and indefinite to meet the requirements of a valid regulation operating upon individual land owners, both in respect of by whom the marking is to be done and the kind and extent of marking or defining intended.

Regulation 9 then proceeds to declare that stock may be taken over the park lands to patented lands with the written permission and under the supervision of the Superintendent, and Regulation 10 prohibits the driving of stock or cattle over Government lands in the park except when authority is granted by the Superintendent.

Maj. Benson construed these clauses of the regulations to extend to and control the driving of stock on public toll-roads from outside the boundary of the park to private patented lands therein.

Here, again, the appellee attempts an interpretation which is not required by the language used and which, as an inroad upon the right of the public to the free and unrestricted use of public highways, is as serious as that attempted upon the right of owners of private patented land.

The concern of the United States, as counsel for the appellee concede, is only to prevent injury to the Government land, and it must be further conceded that the United States has no concern with the use of a public highway traversing government lands. There could be trespass only in case cattle stray from the public road on to the park lands.

In the light of these considerations, the obvious meaning and intent of the language used in the regulations is that the

driving of cattle (otherwise than on public highways) across government lands, which would otherwise be trespass, may be done only with the written permission and under the supervision of the Superintendent. At any rate, the language used is too vague and ambiguous to meet the requirements of a valid regulation affecting the use of public highways.

Furthermore, the Secretary of the Interior, by another set of regulations of the same date as those invoked by the appellee, fully covered the subject of stock trespassing on the government lands, the duty of the Superintendent with respect thereto, and the penalty to be suffered by owners of trespassing animals, of which regulations the Court may take notice. They are as follows (see Senate Doc. 396, Part 1, 59th Congress, p. 305):

"IMPOUNDING AND DISPOSITION OF LOOSE LIVE STOCK FOUND IN YOSEMITE NATIONAL PARK.

Department of the Interior,
Washington, D. C., April 22, 1905.

"Horses, cattle, or other domestic live stock running at large or being herded or grazed on the Government lands in the Yosemite National Park without authority from the superintendent of the park, will be taken up and impounded by the superintendent, who will at once give notice thereof to the owner, if known. If the owner is not known, notices of such impounding, giving a description of the animal or animals, with the brands thereon, will be posted in six public places inside the park and in two public places outside the park. Any owner of an animal thus impounded may, at any time before the sale thereof, reclaim the same upon proving ownership and paying the cost of notice and all expenses incident to the taking up and detention of such animal, including the cost of feeding and caring for the same. If any animal thus impounded

should not be reclaimed within thirty days from notice to the owner or from the date of posting notices, it shall be sold at public auction at such time and place as may be fixed by the superintendent after ten days' notice, to be given by posting notices in six public places in the park and two public places outside the park, and by mailing to the owner, if known, a copy thereof.

"All money received from the sale of such animals and remaining after the payment of all expenses incident to the taking up, impounding, and selling thereof, shall be carefully retained by the superintendent in a separate fund for a period of six months, during which time the net proceeds from the sale of any animal may be claimed by and paid to the owner upon the presentation of satisfactory proof of ownership: and if not so claimed within six months from the date of sale such proceeds shall be turned into the Yosemite National Park fund.

"The superintendent shall keep a record in which shall be set down a description of all animals impounded, giving the brands found on them, the date and locality of the taking up, the date of all notices and manner in which they were given, the date of sale, the name and address of the purchaser, the amount for which each animal was sold and the cost incurred in connection therewith, and the disposition of the proceeds.

"The superintendent shall, in each instance, make every reasonable effort to ascertain the owner of the animals impounded and give actual notice thereof to such owner.

E. A. HITCHCOCK,
Secretary of the Interior."

THE REGULATIONS IN QUESTION, AS CONSTRUED BY THE APPELLEE, WOULD BE UNREASONABLE AND INAPPROPRIATE.

For the sake of the argument, it may be assumed that the act creating the Yosemite National Park gives the Secretary of the Interior full authority to make regulations for carrying out the purpose of Congress, but it is a necessary

incident of such authority that such regulations be reasonable and appropriate.

The situation is shown by the two maps incorporated in the record. The reservation, afterwards known as the Yosemite National Park, created by the Act of October 1, 1890, was bounded on the west by the west boundary of the tier of townships in Range 19 East. Subsequently, by the act of February 7, 1905, this boundary was drawn in as shown on the two maps, and, at the time the bill herein was filed (July 29, 1905), the lands of the plaintiff within the then boundary of the park were those marked on Exhibit A in Sections 3, 14, 16, 17, 18, 21, and 23, in T. 2 S., R. 20 E., and Section 13, T. 2 S., R. 19 E.

While the declared or theoretical boundary of the park is run around a tongue-like strip of land extending westerly, in order to take in the Tuolumne and Merced groves of big trees, the actual boundary of the park proper, in fact and in law, is along the eastern side of the patented land in Sections 3, 9, 16 and 21, in T. 2 S., R. 20 E.

Within the tongue of land referred to, which is about five miles long by one to two miles wide, there are only four parcels of Government land, the Merced Grove 160 acres, the Tuolumne Grove 40 acres, 120 acres in Section 13, T. 2 S., R. 19 E., and 40 acres in Section 18, T. 2 S., R. 20 E., all the balance of the land being patented.

The Big Oak Flat Tollroad crosses the theoretical boundary of the park in Section 7, T. 2 S., R. 20 E., and with the exception of crossing the Tuolumne Grove forty and the unpatented forty in Section 18, runs over patented lands to the appellant's land in Sections 16, 17 and 18, and crossing Section 15, which seems to be all unpatented, extends to the appellant's 160-acre tract in Sections 14 and 23.

This last-mentioned tract is, in fact, the only land of the appellant within the actual, as distinguished from the theoretical, boundary of the park.

Another public tollroad crosses the theoretical boundary

of the park at the west line of Section 13, T. 2 S., R. 19 E., crosses one of the Government forties in that Section, and then runs entirely over patented land to the appellant's land in Section 18, T. 2 S., R. 20 E., where it joins the public tollroad first mentioned.

So that, with the exception of the 160 acres in Sections 14 and 23, T. 2 S., R. 20 E., the appellant's lands are not surrounded by, but merely adjoin, Government lands at his east boundary, yet Major Benson has undertaken to forcibly prevent the appellant from taking his cattle to those lands on and along the public tollroads mentioned or in any other manner. These lands of the plaintiff could be reached by passing over private lands without touching the comparatively small segregated holdings of the Government.

In this respect, there might be a difference in status between these lands and the appellant's 160 acres in Sections 14 and 23, T. 2 S., R. 20 E., if the circumstance of being entirely surrounded by the Government park land were of any consequence. But, inasmuch as the public tollroad extends to this 160-acre tract, there is in fact no difference in status, and the appellant could drive his cattle on this tollroad to this 160-acre tract and graze the same thereon without trespassing upon the Government park lands.

The appellee does not contend that the regulations in question require private owners to fence their lands, but yet the foundation of the argument in his behalf is that the sanction for the regulation is the prevention of anticipated trespass.

It is obvious, however, that the mere marking of boundaries would have no tendency to prevent cattle straying from private land on to Government park land, and hence the assumed requirement of the regulations is obviously inappropriate to the assumed object or purpose thereof.

Furthermore, the fact that lands are patented implies that they have been surveyed by the United States. In other words, the United States has already sufficiently iden-

tified the boundaries and, in the eye of the law, it and its officers are already cognizant thereof.

Major Benson, in his testimony (R., p. 39) asserted that he had done considerable surveying and knew the metes and bounds between the private and government land, but that the private owners did not, and had claimed more land than they were entitled to.

Hence, from Major Benson's standpoint, the purpose of the regulation in requiring the private owners to mark their boundaries is not to furnish him or the Government information.

His position, as resolved from his testimony (R., p. 39) is that private owners, in case of dispute, are required to "make a survey and point out their metes and bounds by *an agreed understanding.*"

But so long as there is dispute, there cannot be agreement; and it could not be intended that the owner mark boundaries as claimed by him but denied by the Superintendent, or that the owner mark boundaries as claimed by the Superintendent but denied by him.

According to Major Benson, he already knows the boundaries, and, if the owner agrees with him, no marking is necessary, but that, in case of dispute, the regulation requires the owner to come to an agreement with him. Needless to say, such agreement could be only acquiescence in the boundary as declared by Major Benson.

It appears from Major Benson's testimony (R. p. 39) that he had made a practice of impounding cattle found on disputed ground and had been annoyed by resulting suits brought by the owners, and his idea of the regulation is that it enables him, by depriving the private owners of the use of their land, to coerce them to acquiesce in and recognize the boundaries as declared by him.

But a dispute as to boundaries is a matter for determination by the judiciary. A regulation attempting by force to coerce a disputant to yield his contention and right of ap-

peal to the courts, or even one attempting merely to require disputants to come to an agreement, would be futile, unreasonable and inappropriate.

Furthermore, the straying of cattle beyond boundaries of private land is, in fact, not a matter of serious consequence. From a report of the Superintendent of the Park (R. p. 37) it appears that there could be no objection to private owners grazing cattle on the Government land near their own premises; the regulations in question provide for the grazing of cattle on the Government lands by authority of the Superintendent; and the other regulations of the same date provide ample and effective measures to protect the Government lands against cattle thereon without authority.

THE UNITED STATES HAS NO POWER TO REQUIRE PRIVATE OWNERS TO MARK THE BOUNDARIES BETWEEN THEIR LAND AND GOVERNMENT LAND, MUCH LESS TO DEPRIVE PRIVATE OWNERS OF THE USE OF THEIR LAND AND THE USE OF PUBLIC HIGHWAYS LEADING THERETO AS THE PENALTY OF FAILING TO COMPLY WITH SUCH REQUIREMENT.

The argument under this head has already been covered incidentally by what has been presented under the preceding heads.

In the consideration of this question the circumstance of the creation and existence of the National Park is wholly immaterial, in view of the principle upon which the defense, as it concedes, is forced to rely, viz., that the Government may by force prevent trespass upon, or injury to, its own lands, which principle applies as well to unreserved as reserved lands.

The rulings of this court upon the statute relating to the fencing of Government lands invoked by the appellee have no bearing on the question. The court there held that Con-

gress has power to and, by the statutes in question, has legislated against the fencing of private land in such manner as to enclose Government land, in effect, purpresture. This is far from holding that the United States can require private owners to fence or even mark the boundaries of their land.

The distinction is in the fact that the Government may prevent or punish that which may be a trespass or purpresture upon, or injury to, its own land. It cannot require a private owner to do anything on his own land. To do so would be an attempt to exercise the proper and exclusive police power of the State and be, in effect, the taking of private property without due process of law and without compensation.

The proposition becomes more appalling when it is undertaken, in effect, to confiscate private property as the penalty for failure to mark or define boundaries of which the Government is already fully cognizant.

The complete answer to the argument of the appellee is that if the Government desires marking or defining of boundaries beyond that afforded by the public surveys, it should itself do it.

The foregoing is submitted as a concise statement of the position of the appellant. Fuller argument and citation of authority will be found in the Opening, Reply, and Supplemental Reply Briefs of Counsel for Appellant.

Counsel for the appellee, as an afterthought, in a reprint of their brief, submit the proposition that the appellant should be denied relief in equity because Major Benson testified vaguely that back in 1895 or 1897 stock belonging to the appellant had strayed on to Government land and that the appellant had fenced more land than Major Benson claimed he was entitled to. The mere statement of the proposition is sufficient to dispense with need for reply.

Such defense was not attempted to be set up in the plead-

ings, nor was it mentioned in the agreed statement of facts or in the finding of the court below, nor is it in any wise presented by the record.

Major Benson's testimony now invoked was offered and admitted merely as explanatory of the occasion for the making of the regulations in question, and there was no onus upon the appellant to offer evidence on the subject.

The condition which Major Benson describes, disputes as to boundaries and resulting trouble over cattle, was one of the reasons for the passage of the Act of 1905 drawing in the boundaries of the Park so as to exclude large areas of patented land, and, to that extent, relieve the situation.

There was no suggestion that the appellant had turned, or intended to turn, his stock on to Government park land. His right to take it to, and graze it, on his own land is alone involved in the case.

Respectfully submitted,

WILLIAM C. PRENTISS,

Of Counsel for Appellant.

NO. 1[redacted]1

YOSEMITE NATIONAL PARK

Private Property v. Federal Regulations

In the Supreme Court of the United States

IN EQUITY

J. B. CURTIN

Appellant and Complainant

v.

H. C. BENSON, (Major 14th Cavalry, U. S. Army, and Superintendent of the "Yosemite National Park") et al.

Appellees and Defendants

REPLY BRIEF ON BEHALF OF APPELLANT

MARSHALL B. WOODWORTH

Attorney for Appellant

YOSEMITE NATIONAL PARK
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Appellees and Defendants.

No. 146

REPLY BRIEF ON BEHALF OF APPELLANT.

The brief for Appellee's, filed by the learned Attorney-General, inadvertently contains some confusing statements, both as to matters of fact and propositions of law urged by Appellant.

FACTS SHOWN BY THE RECORD.

The "Agreed Statement of Facts" (Tr. of Rec., pp. 33-34) and the supplementary evidence (Tr. of Rec., pp. 35-42) indisputably show:

I.

That the Appellant does not travel over or use the "Park lands" for the purpose of driving his cattle or stock to and from the lands owned and leased by him, but that he uses, or desires to use, *the public highways or toll-roads leading to his lands.* (See Agreed Statement of Facts; Tr. of Rec., pp. 33-34.)

RULES 9 AND 10 EXPRESSLY REFER AND ARE CONFINED TO *"PARK LANDS"* AND NOT TO *PUBLIC HIGHWAYS.*

The "Agreed Statement of Facts" (Tr. of Rec., p. 34—part 7) reads: "That prior to the commencement of this action, the defendant, H. C. Benson, as such superintendent of said Yosemite National Park, did refuse to allow and by force did prevent said plaintiff from driving any of his said cattle or horses in, upon or over said *toll-roads to his said lands in said Park.*"

There is not the slightest pretense or claim made, either in the "Agreed Statement of Facts" or in the supplementary evidence, that the Appellant ever has driven, or proposes to drive, his cattle or

stock over the "Park lands;" on the contrary, it may be conceded that, *did he intend* to drive his cattle or stock over "Park lands," that is, *lands owned by the United States*, he would first have to obtain permission to do so. But, the "Agreed Statement of Facts" shows that he seeks only to use the *public highways* or *toll-roads* leading to and from *his lands*. .

The rules in question are limited, obviously, to "Park lands," that is, *lands belonging to the United States*. But the public highways are *not "Park lands"* and *do not belong to the United States*. The State of California has never ceded either its title or its political sovereignty over these public highways to the United States. Until it does so, the United States has absolutely no right to regulate the use of the public highways within the State of California, even though some of the public lands of the United States may lie alongside of these public roads. As to these lands, the United States is but an "ordinary proprietor."

The Fort Leavenworth Case, 114 U. S., 525; 29 L. Ed., 264.

As we stated in our Opening Brief, and iterate in this Reply Brief, the enforcement of Rules 9 and 10 must be limited, by the Military Superintendent of the Park, to lands which are "Park lands," that is, lands which *belong to the United*

States, and they cannot be extended, in their operation, to private property—patented lands—or public highways, even though these may happen to be situated within the outside boundary lines of the Yosemite National Park, in the absence of a statute of the State of California, ceding its political sovereignty over all such patented lands and public highways.

These rules were intended to be, as shown by their context, and *should be*, by this Court, *limited* to the lands *actually owned by the Government* within the confines of the Yosemite National Park; for instance, to roads which the Government itself has constructed, or may construct on "Park lands" —lands owned by the United States. These rules should be held inoperative as to *public highways*, which the United States has never owned, and over patented lands owned by private citizens.

The last part of Rule 9 provides that: "Stock may be taken over the *park lands* to *patented lands* with the written permission and under the supervision of the superintendent." If the Appellant desired to take his stock over "Park lands (that is, *lands owned by the United States*), in order to reach his patented lands, undoubtedly he would be required to obtain such permission. But the Appellant seeks *only* to use the *public highways*, and not the *"Park lands,"* for the purpose of going to and from *his lands*.

The Appellees, as disclosed by the Agreed Statement of Facts (Tr. of Rec., p. 34), have prevented him from using *the public highways*, and will continue to prevent the Appellant from using the *public highways*, for the purpose of driving his cattle and stock to and from *his lands*, unless he first gets written permission from the Appellees, as provided by Rules 9 and 10.

This is exactly of what the Appellant complains, and it is just for such acts, preventing him by armed force from using *the public highways to and from his lands*, that he seeks relief in a Court of Equity to restrain the Appellees from their unjustifiable and arbitrary actions.

The forcible character of the restraint upon the Appellant is disclosed by Part 4 of the "Agreed Statement of Facts" (Tr. of Rec., p. 33), which states: "And for the purpose of enforcing said Rules and Regulations, he has a body of troops under his command."

Therefore, *this fact*, established by the "Agreed Statement of Facts" and the supplementary evidence in the case, *must be clearly borne in mind*, viz: that the Appellant *does not seek* to drive his cattle or stock over "Park lands," that is, lands owned by the United States, *but wishes to use the public highways leading to and from his lands, without any restraint, dictation or interference from the*

Appellees, and just the same as any citizen may do.

We, therefore, respectfully submit that, on this branch of the case, the position of the Appellees is indefensible.

The Secretary of the Interior has no right to promulgate or permit the operation of a rule, and the Appellees have no right to enforce such rule, requiring written or any permission to Appellant for the use by him of *the public highways* to drive his cattle and stock to and from his lands at will.

The State of California not having ceded its political jurisdiction over the public highways or patented lands lying within the outside boundary lines of the "Yosemite National Park," the Appellant should be permitted to use *the public highways* leading to and from his lands, with that same freedom which belongs to every citizen of California, and of the United States.

Furthermore, it must be conceded, as a proposition of law, that, if the Appellant is required to obtain permission to travel to his lands over the public highways, the power is lodged in the Military Superintendent of the Park to impose whatever conditions he may see fit, and thus put it beyond the power of Appellant to comply with the conditions imposed. Or, again, the Military Superintendent of the Park may see fit to withhold permission altogether, for, as was said by the Supreme Court of

the State of California, in the case of Colegrove Water Co. v. City of Hollywood, 151 Cal. Rep., 425, 431; where this principle was involved: "This ordinance does not purport to be a regulation of the manner of doing work. It assumes to require a franchise or privilege as a condition precedent to the occupation of the soil at all. The power to grant a 'franchise or privilege' implies *the power to withhold it.* (State v. City of Spokane, 24 Wash., 53; 63 Pac., 1116.)"

So, in the case at bar, the Military Superintendent, under Rules 9 and 10, has *the power to withhold permission* to travel the public highways, to the irreparable injury of the Appellant, and leaving him remediless in the premises. In fact, the Military Superintendent of the Park admits, upon cross-examination, that he will not permit the Appellant to use the public highways to drive his cattle to and from *his lands* or to permit his cattle to graze upon *his lands* unless he *first fences* his lands. (See Tr. of Rec., p. 40.)

Such arbitrary and unlimited power, exercised to the positive detriment of the vested rights of property owners to use their lands for lawful purposes and to travel the public highways without hindrance or molestation from anyone, was never contemplated by the promulgation of Rules 9 and 10. These rules, from their context and the principles of law applicable thereto, must be limited

strictly to "Park lands," that is, *lands owned by the United States,* and over roads constructed by the Government over its own "park lands," and cannot be extended, in their operation, to private lands, which were such long before the creation of the "Yosemite National Park," or to public highways, which have existed in that section of the State of California ever since its admission as a State, on September 9, 1850.

II.

LANDS OF APPELLANT NOT IN "YOSEMITE VALLEY"—ENFORCEMENT OF RULES UNREASONABLE AS TO APPELLANT'S LANDS.

The established facts in the case further show that the lands owned and leased by the Appellant, and which he is prevented from using for grazing purposes by the Appellees, and the public highways leading to and from his lands, are not within the "Cleft" or "Gorge" known to the world as the "Yosemite Valley." They are at least fourteen miles distant from the "Yosemite Valley."

"Q. Mr. Curtin, how far from the valley itself are your lands by road?"

"A. From my own land, Section 16 to South 20, it is considered fourteen miles to the hole of the valley." (Tr. of Rec., pp. 36-37.)

The "Yosemite Valley" is within the "Yosemite Valley Grant" (Act of June 30, 1864; 13 Stat., 325), but the lands owned and leased by the Appellant and the public highways immediately leading thereto are not in the "Cleft" or "Gorge" known as the "Yosemite Valley," nor indeed *even within* the "Yosemite Valley Grant." (See the two maps appended to page 42 of the Transcript of Record.)

Map No. 1 (Exhibit "A") shows the location of the "Yosemite Valley Grant," which contains the "Yosemite Valley," and it shows the public toll-roads. The lands of the Appellant, as described in his bill of complaint and admitted in the answer (See Tr. of Rec., pp. 2-22), are situated in and around "Gin Flat," "Tamarack Flat," "Crane Flat" and "Hodgdon Ranch," all accessible from the public highway.

Map No. 2 (Exhibit "A") shows exactly the location of the Appellant's lands, and their distance from the "Yosemite Valley," and the fact that the Appellant's lands are outside of, and a considerable distance from, the "Yosemite Valley Grant."

The Appellant testified as follows:

"Q. Let me ask you this: Do any of the lands owned and leased by you come within the following description, and I now refer to an Act of the Legislature of the State, entitled "An Act to Recede and Regrant unto the United States of America the "Yosemite Valley"?

"A. None whatever.

"Q. And the land embracing the Mariposa Big Tree Grove.

"A. No sir, none whatever.

"Q. Approved March 3, 1905, which gives the description of the land receded and regranted to the United States as follows:

"Mr. Devlin: There is no dispute about that. * *

"Mr. Woodworth: You will admit that none of the lands owned or leased by the plaintiff come within the terms of the Act of the Legislature of this State receding and regranting the Yosemite Valley?

"Mr. Devlin: Yes." (Tr. of Rec., p. 36.)

Therefore, the lands of Appellant are neither within the terms of the original Act of Congress of June 30, 1864, ceding the "Yosemite Valley" to the State of California, "in trust for public use, resort and recreation," nor are they within the purview of the Recession Act of the State of California, receding and regranting to the United States the "Yosemite Valley."

It further appears from the testimony of the superintendent of the park, Major Benson, that none of the Appellant's cattle or stock ever stray or wander into the "Yosemite Valley."

"Q. Have you personally seen any cattle within the cleft or gorge of the Yosemite Valley proper which had strayed from the surrounding country?

"A. No, sir.

"Q. So that as to the land which has been receded by the State so far as that body of land is considered, no cattle have ever strayed in that body, so far as you know?

"A. I knew nothing about the Yosemite Valley during the time it belonged to the States. It has not, since last August.

"Q. But during your own experience I am asking?

"A. No, sir." (Tr. of Rec., p. 41.)

We advert to these facts for the purpose of showing that the apprehensions, on the part of the Government, that, unless these rules are strictly enforced as against the Appellant, the "Yosemite Valley" is in danger of despoliation and the safety and pleasure of tourists interfered with, are groundless.

The only ground upon which these rules can be sustained, as to their reasonableness, is that they are intended to protect and preserve the "Yosemite Valley." But, it affirmatively appears from the evidence that (a) the Appellant's lands are not in the "Yosemite Valley" (which is the only place visited by the traveling public), but are fourteen miles away; and (b) that Appellant's cattle or stock never stray into or graze in the "Yosemite Valley."

It, therefore, is apparent that the enforcement of rules 9 and 10, denying Appellant's right to graze

his cattle on his own land, and to use the public highways in driving his stock to and from his own lands, becomes unreasonable in the extreme and should not be permitted to have any operation.

The sentimental contention of Counsel for the Government that the enforcement of these rules, as against Appellant, is necessary for the preservation of the natural wonders contained in the "Cleft" or "Gorge" known to the world as the "Yosemite Valley," is seen to be fallacious, inasmuch as Appellant's lands are fourteen miles away and cattle or stock never penetrate the "Yosemite Valley."

Under the facts as proved in this case, the enforcement of Rules 9 and 10 is unreasonable in the extreme, and, if permitted, amounts to a confiscation of Appellant's lands, for they are rendered useless and profitless.

It is true that a portion of Appellant's lands are within the outside boundary lines of the "Yosemite National Park," and the rules, being made for the park as a whole, are technically applicable. But the rules were made primarily for the immediate benefit of the "Yosemite Valley" the place visited by the traveling public. The "Yosemite Valley" itself is but about 15 miles long and 1 mile wide. The "Yosemite National Park" comprises an immense tract of land, embracing 1512 square miles of land. The lands of Appellant are within the "Park" but not within the "Valley." The enforce-

ment of these rules, as to Appellant's lands fourteen miles away from the "Yosemite Valley," and his right to use public highways leading to and from his lands distant fourteen miles from the entrance to the "Valley," cannot be deemed to affect the natural wonders or scenery of the "Yosemite Valley," and is unreasonable, arbitrary and unjustifiable.

It is to be further observed that the public lands in and around the lands owned and leased by the Appellant were not made part of the "Yosemite National Park" until October 1, 1890. The lands owned and leased by Appellant had been patented previous to that time, and, of course, Sections 16 and 36, (School-sections) belonged exclusively to the State upon its admission. The mere fact that on October 1, 1890, the United States saw fit to withdraw from entry certain public lands surrounding and contiguous to the "Yosemite Valley," and named it the "Yosemite National Park," could not operate to divest or impair in the slightest degree the rights of Appellant, or of Appellant's grantors, in and to the lands owned and leased by him, and his right to use the public highways at will. So long as the State of California has not ceded to the United States its political sovereignty and jurisdiction over the private lands and public highways situate within the "Yosemite National Park," *every foot of the territory on such private lands and public highways and every person thereon is subject, as*

to all police regulations, to the laws of the State of California, and to none other.

Until the State of California does cede to the United States its political sovereignty and jurisdiction over the private lands and public highways situated within the "Yosemite National Park," the rights of the United States in and to the park lands are simply those of an "ordinary proprietor."

The Fort Leavenworth Case, 114 U. S. 525; 29 L. Ed. 264.

Major Benson, the Military Superintendent of the Park, while admitting in his testimony (See Tr. of Rec., p. 41), that cattle and stock do not penetrate into the "Yosemite Valley" (the only place to which the traveling public repairs), yet states that the cattle of Appellant have strayed over the "park" or public lands adjacent to Appellant's lands. (See Tr. of Rec., pp. 38-39.)

Major Benson complains that the cattle graze upon and damage the "park" or public land.

But the report of the Acting Superintendent of the "Yosemite National Park" to the Secretary of the Interior for the year 1901—an official publication—differs radically with the views of Major Benson. A paragraph of that Report (p. 3) reads: "After due consideration, based upon the best evidence I have been able to obtain, I can see no ob-

jection to property owners and those holding leased land within the park limits grazing cattle near their own premises under the supervision of the park authorities." (See Tr. of Rec., p. 37.)

If it be true, that the cattle of Appellant have strayed from the Appellant's lands onto the "Park" or public lands adjacent thereto, the United States has an ample remedy in a suit for damages, if any damage at all can be proved.

Again, the United States can prevent the straying of cattle onto the "Park" or public lands by fencing its own land.

But, the trouble is that the Military Superintendent of the Park seeks, by enforcing the terms of Rules 9 and 10, to compel the Appellant to fence his own lands at great expense to himself. He testifies, on cross-examination: "Q. Is it not a fact that you have removed cattle and stock on the lands of Senator Curtin on the ground that he had not complied with this rule and had not fenced his land?"

"A. Yes, sir.

"Q. It is a fact?

"A. Yes, sir.

"Q. And you propose, as stated in the agreed statement of facts here, to keep him from using his lands or driving his cattle to and from his lands

until he does set out these lands by metes and bounds?

"The Court: I want to say this: If those facts are agreed on and filed here, I shall be governed by them even though you should succeed in disproving them.

"The Witness: I do not attempt to disprove that. I admit that. Those are the facts. (Tr. of Rec., p. 40.)

Therefore, unless Appellant will first fence his lands, as required by the Military Superintendent of the Park, he is denied the right of grazing cattle on his own lands; and, unless Appellant will submit to the rule requiring him to apply to the Military Superintendent of the Park for permission to drive his cattle to and from his lands *on the public highways* (and not on "park" lands), he is denied the right to use such public highways by the exercise of military force.

Such treatment of the rights of Appellant as a citizen of the State of California, and as an owner of land acquired previous to the formation of the "Yosemite National Park" in 1890, is, we respectfully submit, arbitrary and unjustifiable.

If cattle do occasionally stray and wander from Appellant's lands onto the adjacent "park" or public lands, there is a perfect remedy open to the Government of the United States by resort to its courts, instead of allowing the Military Superin-

tendent of the Park to take the law into his own hands. The United States can maintain suits, in its Courts of Justice, and can proceed, in a lawful, regular and dispassionate manner, to recover damages actually proved to have been committed by the trespassing of Appellant's cattle. But the Military Superintendent of the Park, with a body of soldiers at his command, should not arbitrarily arrogate to himself the majesty of the law under the guise of enforcing certain rules, and, without due process of law, by force and arms, drive the cattle of Appellant from his lands, and forcibly restrain him from a rightful use of the public highways leading to and from his lands.

There is nothing in either Rule 9 or 10 which requires the Appellant to fence his lands. Yet this is exactly what the Military Superintendent of the Park insists the Appellant must do before he can use his land or the public highways. (See Tr. of Rec., p. 40.) The requirement in Rule 9 that the lands of private owners "shall have the metes and bounds thereof so marked and defined as that they may be readily distinguished from the park lands," is not tantamount to a rule requiring the Appellant to fence his lands. But even if it could be so interpreted, the United States has *no inherent right* to require the owners of private land within a State to fence their lands. That is a matter of "police power" which inheres solely in the sovereignty and

political jurisdiction of the State. So long as the State of California has not ceded to the United States its sovereign and political jurisdiction over all patented lands and public highways within the "Yosemite National Park," the United States is impotent to compel private owners to fence their lands or to interfere in the slightest degree with their use of the public highways within the State.

If Rules 9 and 10 have any efficacy at all, they must be confined in their operation to "*park lands,*" that is lands *owned by the United States.* So long as the State of California has not ceded its political and sovereign jurisdiction, these rules can have no effect upon patented lands and public highways, even though within the outside confines of the "Yosemite National Park."

III.

THE UNITED STATES IS BUT AN "ORDINARY PROPRIETOR" OF THE "PARK" LANDS—CALIFORNIA HAS NOT CEDED TO THE UNITED STATES ITS POLITICAL AND SOVEREIGN JURISDICTION OVER THE PATENTED LANDS AND PUBLIC HIGHWAYS WITHIN THE "YOSEMITE NATIONAL PARK."

We are brought to the third and controlling fact in the case, and that is, that the State of Cali-

fornia has not, as yet, ceded to the United States its political and sovereign jurisdiction over all patented lands and public highways within the "Yosemite National Park."

This fact is incontestably established in the case and counsel for the United States does not venture to controvert it in the slightest respect.

This fact is, in our judgment, controlling of the decision in the case at bar. There can be no escape from the proposition that, until the State of California does cede to the United States its sovereignty and political jurisdiction over the private lands and public highways within the "Yosemite National Park," the rules here sought to be enforced can have no application whatever and must be confined strictly to "park" lands, that is, *lands owned by the United States.*

Counsel for the United States fully appreciates the significance of this controlling fact, but seeks to escape its force, by claiming that the United States has, as to its own lands, a "police-power," which would justify the enforcement of Rules 9 and 10 upon the owners of private lands and control their use of the public highways, and counsel cites, in support of his contention, the case of Camfield vs. United States, 167 U. S. 518; 42 L. Ed. 260.

It may be conceded that the United States has a "police-power" over its own lands, that is, "Park

Lands"—*lands owned by the United States.* This is all that is decided by the case of Camfield vs. United States. But the United States has no "police-power" over private lands and public highways within a State. The syllabus of the case of Camfield vs. United States clearly indicates the extent to which this Court went, in holding that the United States had, as to lands *owned by it* within a State, certain "police-power." It reads: "The fact that public lands are within a State does not prevent the Government from exercising the rights of an *ordinary proprietor* to maintain its possession and to prosecute trespassers."

But, this Court did *not go to the extent of holding* in that case that, where a State has not ceded its political sovereignty and jurisdiction over private lands and public highways, the United States, under the guise of the exercise of "police-power" as an ordinary proprietor, could extend such "police-power" over private lands and public highways not owned by it. It is one thing for the United States to exercise police-powers to protect its rights as an *ordinary proprietor* of land; it is quite another and different thing for it to impose such "police-power" upon private lands and public highways which it does not own and as to which the State has never ceded its sovereignty.

Undoubtedly, the United States, as an ordinary proprietor of the "park" lands, can exercise such

police-power, by means of laws or regulations and rules, as will maintain its possession of the "park" lands, prosecute trespassers, etc. For instance, it may promulgate and enforce rules forbidding trespassing upon those "park" lands which it owns, or it may fence its own lands, or it may regulate the travel over the roads constructed by it upon its *own lands* within the park. These are all matters which any ordinary proprietor of land may do. They are rights incident to the ownership of land.

But, counsel for the United States has been unable to adduce a single authority which goes to the extent of holding that, where the State has not ceded its political sovereignty, the United States, as an ordinary proprietor of land, under the guise of protecting his own land, can compel adjacent private owners of land to fence their land, before being permitted to graze their cattle thereon, or compel private owners of lands to obtain its permission in using the public highways to drive cattle to and from their lands. No such invasion of States' rights can be found judicially endorsed by a single authority.

Such extreme view is certainly not countenanced by this Court in the case of Camfield vs. United States, (167 U. S. 518, 524; 42 L. Ed. 260, 262); for this Court used the following language:

"While the lands in question are all within the State of Colorado, the Government has, with respect

to its own lands, the rights of an ordinary proprietor, to maintain its possession and to prosecute trespassers. It may deal with such lands precisely as a private individual may deal with his farming property. It may sell or withhold them from sale. It may grant them in aid of railways or other public enterprises. It may open them to pre-emption or homestead settlement; but it would be recreant to its duties as trustee for the people of the United States to permit any individual or private corporation to monopolize them for private gain, and thereby practically drive intending settlers from the market. It needs no argument to show that the building of fences upon public lands with intent to inclose them for private use would be a mere trespass, and that such fences might be abated by the officers of the Government or by the ordinary processes of courts of justice. To this extent no legislation was necessary to vindicate the rights of the Government as a landed proprietor."

This language does not justify counsel for the United States in citing the case as authority for the proposition that the United States can invade the sovereignty of the States, and impinge the exercise of a paramount authority upon the police-power reserved expressly to the States upon their admission to the Union.

It certainly does not justify counsel for the United States in citing the case as authority for the proposition that the United States can, under the guise of a rule or regulation to protect national

parks, compel the private owners of adjacent and contiguous lands to fence their lands at their own expense. The fencing of lands within a State is a matter which appertains solely to the "police power" of a State, and the United States has no constitutional right to invade the sovereignty of a State and to dictate to the citizens of a State when, where, and upon what terms fences must be erected on private lands. This is a right which is reserved solely to the State. The United States will only possess such right in the present case, in the event that the State of California should cede to it its sovereign and political jurisdiction over the patented lands and public highways within the Yosemite National Park. This the State of California has not, as yet, done.

The language used by this Court in the case of Camfield vs. United States, supra, certainly does not justify Counsel for the United States in citing the case as authority for the proposition that the United States can, by any rule or regulation intended for the protection of its public lands, dictate as to how, or in what manner, or when, the public highways within a State shall be used by the citizens thereof. The United States cannot invade the sovereignty of a State in that manner. The right to regulate and control the use of such highways is a police regulation resting *solely in the State* and *not* in the United States.

New Orleans Gas Co. vs. Louisiana Light Co., 115 U. S. 650.
Jones vs. Brin, 165 U. S. 182.

"All toll-roads are still public highways, the *property in which pertains to the State.*"

Blood vs. McCarthy, 112 Cal., 561, 564.

Undoubtedly, when the State of California cedes its sovereign and political jurisdiction over the highways within the Yosemite National Park, then, *and then only*, will the United States have the power to regulate the use of such public highways within the park.

Aside from these observations with reference to the inapplicability of the case of Camfield vs. United States as a controlling authority to the case at bar, a glance at the facts of that case will show that it can have but very little bearing, if any, to the present case. That was a case in which the United States brought a suit in equity against Camfield et al, to remove and abate a fence erected and maintained by the defendants enclosing public lands and appropriating them to the exclusive use of the defendants. The suit was brought under an act of Congress of February 25, 1885, entitled: "An Act to Prevent Unlawful Occupancy of the Public Lands." (23 Stat. at. L. 321, Chap. 149.) It appeared in that case that the defendants had, by an ingenious arrangement in the construction of certain

fences erected on their own lands, enclosed a large tract of public domain to the exclusion of settlers and the traveling public. The suit was brought to have the fence torn down and removed, which the Court granted. It must be obvious that the facts of that case are entirely dissimilar to the facts of the case at bar. In that case, the Government was justified in abating a nuisance for the purpose of protecting the public domain. But, in the case at bar, the Government seeks, by the enforcement of its rules promulgated ostensibly for the benefit of the Yosemite National Park, to compel the Appellant to erect fences on his own land and at great personal expense to him before he is allowed to use his own land or even travel to his own lands. It is one thing to abate a nuisance by compelling one *to remove fences* which were erected in open violation of the law and purposely enclosed the public domain to the exclusion of the rest of the public; it is quite another thing in law to seek to compel a citizen *to erect fences* on his own land at great and, perhaps, ruinous expense, which fences would redound primarily to the benefit of the Government.

This contrast between the facts in the case of Camfield vs. United States and the facts established in the case at bar is sufficient, we respectfully submit, to show the utter inapplicability of the former case as authority for the decision in the case at bar.

IV.

POWER TO REQUIRE PERMISSION TO TRAVEL PUBLIC HIGHWAYS CARRIES WITH IT THE POWER TO DENY SUCH PERMISSION ARBITRARILY.

The very statement of this point shows the invalidity and unreasonableness of that portion of Rules 9 and 10, under the guise of which the Military Superintendent of the Park seeks to, and actually does, prevent the Appellant from using the public highways unless he first gets permission from such Military Superintendent.

In order properly to arrive at the question for determination by this Court, we must consider the conduct of both parties to this suit and the facts that led to this controversy.

Appellant owns certain land within the Yosemite National Park, to-wit: The North half of Section 16 and the South-east quarter Section 18, and leases land in Sections 14, 23 and 17 in Township 2 South, Range 20 East, M. D. M., and also the South-west quarter of Section 13 in Township 2 South, Range 19 East (Tr. of Rec., p. 33.) There passes through these lands from the Western boundary of the Park leading toward the "Yosemite Valley," a toll-road constructed "many years prior to the creation of said Park." (Tr. of Rec., p. 33.) The

Appellant, in order to get to his lands above described, travels the public toll-road to reach those lands, all of which are outside of the "Yosemite Valley." An examination of the maps which accompany the Transcript of Record and found on page 42, will disclose the route of that road, and that it passes through only two 40-acre tracts owned by the Government. The first 40-acre tract that it passes through is the South-east quarter of the South-west quarter of Section 7, the next 40 being the South-west quarter of the North-east quarter of Section 18, both in Township 2 South 19. *All other lands on both sides of that road are patented and held in private ownership.* An examination of those maps will also disclose that the nearest point of Appellant's lands to the "Yosemite Valley" is about fifteen miles, as will be seen from the different sections of land that lie between Appellant's lands in the exterior boundaries of that grant.

In the brief of the learned Attorney-General, on page 11, he states: "It is apparent that the vital question presented in this case is whether the Appellant or the Secretary of the Interior, as authorized by Congress, shall run the Yosemite Park." This, we say, is not the question involved at all in the case. Appellant owns those lands shown on page 33 of Tr. of Rec. and above described. It will also be found, on page 32 of the Tr. of Rec., paragraph 7, that when the Appellant took his cattle to his own

lands over that road, the defendant, Benson, as Superintendent of the Park took the cattle from Appellant's lands and refused to allow them to be grazed thereon until written permission was obtained from the Superintendent of the Park, and that he will at all times continue to remove Appellant's cattle from his lands unless he fences his lands and gets written permission to travel the public highways. (See Transcript of Record, p. 40.)

Instead of, as stated by the learned Attorney-General, the question in this case being "whether the Appellant or the Secretary of the Interior, as authorized by Congress, shall run the Yosemite Park," it is *whether or not the Secretary of the Interior can make and enforce a rule that prevents the Appellant from traveling a public established highway to Appellant's own lands and keeping his cattle on his own lands without permission of the Secretary of the Interior.* That is all the controversy is about. That is all that the Appellant asks—anything in the brief of the learned Attorney-General to the contrary.

If it shall be declared to be lawful for the Secretary of the Interior to say that Appellant can not travel a public highway established before the park was created, and use his own lands which the government patented to him, without permission of the Secretary of the Interior, then the Secretary of the Interior may withhold permission altogether, for,

as decided in the case of Colegrove Water Company vs. City of Hollywood, by the Supreme Court of California, 151 Cal. 425, 431, where this principle is involved: "This ordinance does not purport to be a regulation of the manner of doing work. It assumes to require a franchise of privilege as a condition precedent to the occupation of the soil at all. The power to grant 'a franchise or privilege' implies *the power to withhold it.* (State vs. City of Spokane, 24 Wash. 53; 63 Pac. 1116.)"

Now, under the above quoted doctrine, the Secretary of the Interior through the Superintendent of the Park can deny the right to travel the roads at all; deny the right of the Appellant to go to his own lands or use them at all because, as stated in that case, and which is clearly the law, the power to exact application and to give permission carries with it the power to reject the application and deny the permission, and confiscation of property is the result.

It was practical confiscation of property that led to the bringing of this suit, because, as shown in paragraph 7 of the "Agreed Statement of Facts," (Transcript of Record, p. 34), Appellant's cattle were taken from his land and he was not permitted to use them, and the same force would be used hereafter to prevent his using those lands or to travel that road unless permission were first obtained.

It should be borne in mind that Section 2477

of the Revised Statutes of the United States grants the right of way over Government lands for the public roads involved in the case at bar. Such being the case, then the United States Government should not *now* be permitted to enforce rules as against any one desiring to travel those roads and practically deny them the use of those roads.

In brief, the situation is simply this: the Appellant owns land within the extreme limits of the Yosemite National Park, but fully fifteen miles distant from the "Yosemite Valley," which lands were patented prior to the creation of the Yosemite National Park on October 1, 1890. Leading to his lands are public highways, which were such *long previous* to the creation of a National Park. He owns cattle and horses, and his lands are useless unless he can use them during the spring and summer for grazing purposes. If he cannot travel the public highways for the purpose of driving his cattle to and from his lands without first getting the permission of the Military Superintendent of the Park, his lands are rendered useless and they are practically confiscated. If he cannot graze his cattle and horses on his own land simply because he cannot afford to fence a large body of land, as he is required to do by the Military Superintendent of the Park, his lands are made profitless and are practically confiscated. While these rules

may be valid as to "Park" lands, that is, *lands owned by the United States,* still, until the State of California cedes to the United States its sovereign and political jurisdiction over the patented lands and public highways within the Yosemite National Park, these rules should be limited strictly in their operation and effect to "Park" lands and can have no operation on patented lands or public highways. Whatever incidental "police power" may be possessed by the United States to protect it in the possession of its own lands, nevertheless such "police power" cannot operate to wrest from the State the plenary "police power" expressly reserved to it and of which it cannot be divested except by a solemn act of the legislature of the State ceding to the United States its sovereign and political jurisdiction over certain private lands and public roads within the particular State.

Finally, the fact remains that the State of California has not, as yet, ceded to the United States its sovereign and political jurisdiction over the patented lands and public highways within the National Yosemite Park, and therefore the United States has no "police power" over such patented lands and public highways.

We vigorously maintain that, under all the facts as disclosed in this case, the application of rules 9 and 10 to the private lands of the Appellant

and to his use of the public highways for the purpose of driving his cattle to and from his lands, is unwarrantable, unjustifiable, arbitrary and unlawful, and that the judgment of the Circuit Court, for the Northern District of California, should be reversed, and the relief prayed for be granted.

Respectfully submitted,

MARSHALL B. WOODWORTH,

Attorney for Appellant.

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Supreme Court of the United States

October Term, 1911

J. B. CURTIN,
Appellant and Complainant,
vs.
H. C. BENSON, (Major 14th Cavalry, U. S. Army, and Superintendent of the "Yosemite National Park") et al.,
Appellees and Defendants
No. [redacted]

SUPPLEMENTAL REPLY BRIEF ON BEHALF OF APPELLA[redacted]

MARSHALL B. WOODWORT[redacted]
Solicitor for Appellant
and
J. B. CURTIN,
In propria persona.

J. B. CURTIN,
In propera persona.
Of Counsel.

Supreme Court of the United States

IN EQUITY

J. B. CURTIN, *Appellant and Complainant,* vs. H. C. BENSON, (Major 14th Cavalry, U. S. Army, and Superintendent of the "Yosemite National Park") et al., *Appellees and Defendants*	No. 146

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES, NINTH CIRCUIT, NORTHERN DISTRICT OF CALIFORNIA.

SUPPLEMENTAL REPLY BRIEF ON BEHALF OF APPELLANT

Recent decisions of this Honorable Court in the cases of Fred Light vs. The United States, (No. 360, Oct. Term, 1910), and the United States vs. Pierre Grimaud and J. P. Carajoris, (No. 241, Oct. Term, 1910), and the United States vs. Antonio Inda, (No.

242, Oct. Term, 1910), impel us to submit this Supplemental Reply Brief, leave of court having first been obtained.

These decisions, should the Honorable Attorney General attempt to claim them to be controlling of the case at bar, are inapplicable.

The line of demarcation between those decisions and the case at bar lies in this:

In the cases recently decided, the facts showed that the parties—cattle-men and sheep-herders—endeavored to, and actually did, use the Goverment lands in Forest Reserves for grazing purposes without first getting permission from the Government to do so, or complying with the rules and regulations governing the use, by the public, of *Government* lands in Forest Reserves.

In the case at bar, the facts show that the Appellant wants to use his *own lands,* and not Government lands. He wants to use the public roads leading to and from *his* lands, which public roads now belong to the State of California and do not belong to the United States, and do not traverse "Park" lands, that is, lands owned by the United States.

It is an admitted fact of record in the case at bar that there is no act of the Legislature of the State of California, ceding to the United States the political sovereignty and jurisdiction of the State of California over the private lands and public roads within the Yosemite National Park.

The mere fact that Appellant's private lands and the public roads which he must use to reach his lands are within the outside limits of the Yosemite National Park, which Park was created long after he had acquired his lands and long after the construction and dedication of these public roads to the State of California, should not operate *now* to deprive him of the use of his private lands to graze his stock thereon or prevent him from using the public roads to go and come from his lands at will.

The United States does not acquire dominion over his private lands, nor exclusive charge of the public roads leading to and from his private lands, merely by creating a National Park out of lands adjacent to Appellant's lands.

Nor does it obtain exclusive and absolute control of the public roads running through such Park (the title to which public roads is now in the State of California) unless the State first cedes all its political sovereignty and jurisdiction over such public roads to the United States, which confessedly the State of California has not done up to this time.

The whole matter, it would seem, is one for the Legislature of the State of California.

The moment that the Legislature of the State of California cedes its political sovereignty and jurisdiction over all private lands and public roads within the confines of the outside boundary lines of the Yosemite National Park, then *undoubtedly* the United

States will have absolute and unquestioned power to enact regulations and rules with reference to the use of the private lands and of the public roads in the Yosemite National Park.

But, until the State of California does cede its political sovereignty and jurisdiction, every foot of the territory on private lands and public highways and every person thereon is subject, as to all police regulations, to the laws of the State of California, and to none other.

Meanwhile, the enforcement of rules 9 and 10 must be confined and limited to "Park" lands, that is, lands owned by the Government. If one desires to drive stock over "Park" lands, that is, lands owned by the United States, undoubtedly permission must be first obtained from the Military Superintendent of the Park and the rules and regulations in that regard complied with.

But the Appellant does *not* seek to use "Park" lands, that is, lands owned by the Government, in going to and from his *own* lands; he simply desires to use the public roads leading to and from his own lands, which public roads are *now* owned by the State of California.

Furthermore, the Appellant does not seek to graze his cattle on "Park" lands, that is, lands owned by the United States; but he does desire to graze his stock on his *own* lands.

And he insists that, in his free use of the public

roads leading to and from his lands, and in the use of his own private lands for lawful purposes, he is not subject to any rules and regulations enacted for Yosemite National Park, that is, for those lands owned by the United States which it has devoted to a "Park," and he strenuously contends that the application of rules 9 and 10 as to him is unreasonable under the facts established by the record in the case at bar.

As was well said by this Honorable Court, in its statement of the case in the United States vs. Grimaud et al.:

> "The jurisdiction, both civil and criminal, over persons within such reservation was not to be affected by the establishment thereof, 'except so far as the punishment of offences against the United States therein is concerned; the intent being that the State shall not by reason of the establishment of the reserve lose its jurisdiction, nor the inhabitants thereof their rights and privileges as citizens, or be absolved from their duty as citizens of the State.' "

The above statutory enactment relates, it is true, to Forest Reserves, whereas the Yosemite National Park is governed by a special act of Congress, to-wit: the Act of October 1, 1890, (26 Stat. 651.) But, we take it, that in the absence of any act of the Legislature of the State of California ceding its political sovereignty and jurisdiction over the private lands

and public roads within the Yosemite National Park, the same rule would prevail as now exists with reference to Forest Reserves.

In the cases recently decided by this Honorable Court, the parties endeavored to use the Government lands without first getting permission; but in the case at bar the Appellant does not want to use Government lands. All he asks, is the right to use his own lands and the public roads leading to and from his own lands. He certainly has a right to use his own lands for lawful purposes. To deny him that right is practically to confiscate his property. To deny him the right to use the public roads in going and coming from his own lands without first getting permission from the Military Superintendent of the Park, is practically also to confiscate his land, for, if the permission be withheld (as it has been in the case at bar) he cannot drive his stock to and from his lands.

He is denied the right to use his own lands and to travel on the public highways leading to and from his own lands, because he will not comply with certain rules and regulations (rules 9 and 10; Transcript of Record, p. 34), under the guise of which the Military Superintendent of the Park seeks to compel him to fence his land before using the same or even permitting him to use the public roads to get to and from his lands.

As the Transcript of Record shows (p.p. 40, 41):

(Mr. Woodworth interrogating the defendant Benson, the Military Superintendent of the Park).

"Q. Is it not a fact that you have removed cattle and stock from the land of Senator Curtin on the ground that he had not complied with this rule and had not fenced his land?

A. Yes, sir.

Q. It is a fact?

A. Yes, sir.

Q. And you propose, as stated in the agreed statement of facts here, to keep him from using his lands or driving his cattle to and from his lands until he does set out these lands by metes and bounds?

The Court: I want to say this: If those facts are agreed on and filed here, I shall be governed by them even though you should succeed in disproving them.

The Witness: I do not attempt to disprove that. I admit that. Those are the facts."

* * * * * *

"Q. And it is a fact that you, in carrying out these orders require permits from persons who seek to use the toll road for the purpose of driving cattle to and from land owned by them, and owned by them long before it became a National Park?

A. What is that?

Q. It is a fact that you have enforced the rules referred to in this case?

Mr. Devlin: That is our case.

A. Why, certainly."

We respectfully submit that such rules and regulations as applied to Appellant, and the arbitrary authority sought to be exercised by the Military Superintendent of the Park as disclosed by the facts of the case at bar are unreasonable, unwarranted, unjustified, arbitrary, a gross abuse of power and unlawful; and this is of what the Appellant complains.

It is thus seen that the facts of the case at bar are entirely different and dissimilar from those involved in the cases of Light vs. the United States and the United States vs. Grimaud, et al., recently decided by this Honorable Court.

The Appellant wants to use his own lands, (not "Park" or Government lands), for lawful purposes without molestation or hindrance from anyone. To compel him to fence his lands is a burden and involves a ruinous expense not authorized by any of the rules and regulations upon which the Government relies, and practically results in his being unable to use his lands at all and in their confiscation.

To deny the free and unmolested use of the public roads to and from his lands because he will not fence his lands or submit first to obtain permission from the Military Superintendent of the Park is unreasonable, unjustifiable and arbitrary, and, we might add, an almost tyrannical use of power.

In other words, we respectfully submit that rules 9 and 10, upon which the Government relies, to justify the unlawful and arbitrary acts of the Military

Superintendent of the Park, do not apply to and can have no effect or validity upon the private lands of Appellant or preclude him from the free and unmolested use of the public roads (not owned by the Government) leading to and from his lands.

Furthermore, we respectfully contend that, under the peculiar facts and circumstances disclosed by the record in the case at bar, Rules 9 and 10, and the authority sought to be exercised by the Military Superintendent of the Park under the guise of rules 9 and 10, are unreasonable in their application to Appellant's private lands or to his use of the pubilc roads leading to and from his own lands. The two cases referred to furnish ample authority in the Government to restrain by injunction or prosecute criminally for any trespass on Park lands and no authority ought therefore be attempted to use force to prevent plaintiff from using his own lands lest he might trespass.

Respectfully submitted,

MARSHALL B. WOODWORTH,

Solicitor for Complainant

and

JOHN B. CURTIN,

In propria persona.

JOHN B. CURTIN,

In propria persona,

Of Counsel.

In the Supreme Court of the United States.

OCTOBER TERM, 1911.

J. B. CURTIN, APPELLANT,
v.
H. C. BENSON ET AL. } No. 1.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

BRIEF FOR APPELLEES.

STATEMENT OF CASE.

This is a suit to restrain the superintendent of the Yosemite National Park, Maj. H. C. Benson of the United States Army, and certain soldiers under his command stationed at said park, from interfering with the use for grazing purposes by the appellant of certain lands in the park owned or leased by him, as well as the use by appellant of certain public toll roads passing through the park and leading to his lands for the purpose of driving his cattle to and from said lands.

The suit was brought in the Superior Court of the County of Tuolumne, Cal., but was removed to the United States Circuit Court for the Northern District

of that State. The case was heard upon the pleadings, an agreed statement of facts (Rec., 33), and the testimony of the appellant and the appellee, Benson (Rec., 35–42). The Circuit Court entered a decree dismissing the bill and awarded the defendants costs, from which an appeal has been taken to this court.

The case involves the validity of the following provisions of certain rules and regulations established by the Secretary of the Interior with respect to the Yosemite National Park under authority of the act of Congress approved October 1, 1890 (26 Stat., 650, 651), hereafter referred to (Rec., 34):

> 9. Owners of patented lands within the park limits are entitled to the full use and enjoyment thereof; such lands, however, shall have the metes and bounds thereof so marked and defined as that they may be readily distinguished from the park lands. Stock may be taken over the park lands to patented lands with the written permission and under the supervision of the superintendent.
>
> 10. The herding or grazing of loose stock or cattle of any kind on the Government lands in the park, as well as the driving of such stock or cattle over the same, is strictly forbidden, except in such cases where authority therefor is granted by the superintendent.

The appellant claims the right to drive his cattle to the lands owned and leased by him in the park without complying with these rules. (Agreed Statement of Facts, par. 6, Rec., 34.)

The Circuit Court, in its opinion on final hearing (Rec., 31, 32), held these regulations to be valid.

LAWS RELATING TO THE ESTABLISHMENT AND REGULATION OF THE YOSEMITE NATIONAL PARK.

By an act approved June 30, 1864 (13 Stat., 325), Congress granted to the State of California the "Cleft" or "Gorge" "in the granite peak of the Sierra Nevada Mountains, situated in the county of Mariposa in the State aforesaid, and the headwaters of the Merced River, and known as the Yo-Semite Valley, with its branches or spurs, in estimated length 15 miles, and in average width 1 mile back from the main edge of the precipice on each side of the valley, *with the stipulation, nevertheless, that the said State shall accept this grant upon the express conditions that the premises shall be held for public use, resort, and recreation;* shall be inalienable for all time; but leases not exceeding ten years may be granted for portions of said premises." It was further provided that "all incomes derived from leases of privileges to be expended in the preservation and improvement of the property, or the roads leading thereto."

This grant is indicated on map 1, which appears at page 42 of the record in this case, as the "Yosemite Valley Grant."

By the same act the Mariposa Big Tree Grove was also conveyed to the State of California upon similar conditions.

On October 1, 1890 (26 Stat., 651), the act entitled "An act to set apart certain tracts of land in the State of California as forest reservations" was approved. By its first section the lands surrounding

the Yosemite Valley grant, as indicated on map 1 and inclosed within the yellow boundary marks (Rec. 42), were withdrawn from settlement, occupancy, or sale under the laws of the United States, and set apart as "reserved forest lands." That act provided that nothing therein should be construed as in anywise affecting the grant of the Yosemite Valley and Mariposa Big Tree Grove to the State of California by the act of June 30, 1864, or any bona fide entry of land made within the limits described in said act, under any law of the United States prior to the approval thereof.

The second section of that act provided:

> That said reservation shall be under the exclusive control of the Secretary of the Interior, whose duty it shall be, as soon as practicable, to make and publish such rules and regulations as he may deem necessary or proper for the care and management of the same. Such regulations shall provide for the preservation from injury of all timber, mineral deposits, natural curiosities, or wonders within said reservation, and their retention in their natural condition. The Secretary may, in his discretion, grant leases for building purposes for terms not exceeding ten years of small parcels of ground not exceeding 5 acres at such places in said reservation as shall require the erection of buildings for the accommodation of visitors; all of the proceeds of said leases and other revenues that may de derived from any source connected with said reservation to be expended under his direction in the management of the same

> and the construction of roads and paths therein. He shall provide against the wanton destruction of the fish and game found within said reservation, and against their capture or destruction for the purposes of merchandise or profit. He shall also cause all persons trespassing upon the same after the passage of this act to be removed therefrom, and, generally, shall be authorized to take all such measures as shall be necessary or proper to fully carry out the objects and purposes of this act.

By subsequent appropriation acts, beginning in 1892, Congress made provision for the protection and improvement of the lands so reserved as "The Yosemite National Park," treating them like other national parks theretofore established (30 Stat., 624; id., 700; 31 Stat., 618; 32 Stat., 456; id., 1119; 33 Stat., 487).

The act of June 6, 1900 (31 Stat., 588, 618), contained the following provision:

> IMPROVEMENT OF THE YOSEMITE NATIONAL PARK: For protection of the Yosemite National Park, and the construction of bridges, fencing, and trails, and improvement of roads, other than toll roads, to be expended under the supervision of the Secretary of the Interior, four thousand dollars.
>
> The Secretary of War, upon the request of the Secretary of the Interior, is hereafter authorized and directed to make the necessary detail of troops to prevent trespassers or intruders from entering the Sequoia National Park, the Yosemite National Park, and the

> General Grant National Park, respectively, in California, for the purpose of destroying the game or objects of curiosity therein, or for any other purpose prohibited by law or regulation for the government of said reservations, and to remove such persons from said parks if found therein.

By an act of the Legislature of the State of California approved March 3, 1905, provision was made for the recession to the United States of the "Cleft" or "Gorge," known as the Yosemite Valley, and the Mariposa Big Tree Grove, granted to the State by the act of Congress of June 30, 1864, "*the same to be held for all time by the United States of America for public use, resort, and recreation, and imposing on the United States of America the cost of maintaining the same as a national park.*" (Stats. of Cal., 1905, p. 54.)

This recession was impliedly accepted by Congress by the joint resolution approved March 3, 1905. (33 Stat., 1286.) By the joint resolution approved June 11, 1906 (34 Stat., 831), such recession was formally accepted, and the lands embraced therein withdrawn from settlement, occupancy, and sale, and set apart and reserved as forest lands and made a part of the Yosemite National Park.

By the act of February 7, 1905 (33 Stat., 702), and the joint resolution of June 11, 1906 (34 Stat., 831), the boundary of the Yosemite National Park was somewhat changed by the withdrawal of certain lands therefrom and their inclusion in the Sierra Forest Reserve, but this withdrawal does not affect the present case.

ARGUMENT.

I.

The regulations in question and the action taken for their enforcement were authorized by law.

Section 2 of the act of October 1, 1890 (26 Stat., 650, 651), provides that the Yosemite National Park shall be "under the exclusive control of the Secretary of the Interior, whose duty it shall be, as soon as practicable, to make and publish such rules and regulations as he may deem necessary or proper for the care and management of the same. Such regulations shall provide for the preservation from injury of all timber, mineral deposits, natural curiosities, or wonders within said reservation, and their retention in their natural condition."

This provision is the authority for the regulations in question.

The necessity for making the regulations referred to appears from the testimony of Major Benson, the superintendent of the park. (Rec., 38–39.) Thousands of acres of Government lands in the park had been inclosed as cattle ranges, the people claiming them driving their cattle thereto and letting them loose, so that they strayed over such ranges throughout the entire reservation, the appellant's cattle having been in that condition for a great many years. (Rec., 38.) Because the boundaries

of the private lands were unmarked, the owners thereof, when their cattle were found trespassing upon the Government lands, would dispute the same. The whole place had been overrun with cattle and sheep, and the object of the regulations was to keep people to the use of their own land and prevent the Government's land from being interfered with and injured by the cattle and sheep traveling over it. (Rec., 39.)

In *United States* v. *Shannon* (151 Fed., 863) the United States District Court for the District of Montana said (p. 869):

> No unusual technical knowledge of tree life is requisite to understand that 100 head of cattle grazing together in a basin of limited area in the mountains will tramp down a great many very young trees, and will cut the soil along the banks of the creeks in a way that will injure tree life.

The reply brief of appellant lays great stress on the fact that, as it is asserted, rules 9 and 10 of the regulations established by the Secretary of the Interior with respect to the Yosemite National Park refer only to Government lands in the park, and do not forbid the taking of cattle over other lands therein, including the toll roads, without the permission of the superintendent.

The correctness of this construction is not conceded, but the point is immaterial. The action of the superintendent of the park, Maj. Benson, in denying appellant the right to bring cattle over the toll

roads within the boundaries of the park to the lands owned or leased by him therein, was for the purpose, as the record shows (Rec. 32, 34), of compelling appellant to comply with rules 9 and 10. In other words, the superintendent was merely taking reasonable measures, specifically authorized by law, to insure compliance with the regulations of the Secretary of the Interior.

It will be observed that by the act of June 6, 1900 (31 Stat., 618), above quoted, provision is made for the necessary detail of troops to prevent trespassers or intruders from entering the Yosemite and other national parks in the State of California for the purpose of destroying the game or objects of curiosity therein, "or for any other purpose prohibited by law or regulations for the government of said reservation, and to remove such persons from said parks if found therein." It appears from the record (p. 19) that at the time of the commencement of this proceeding Maj. Benson was in command of certain troops of the Fourth United States Cavalry, and the answer, which is not controverted in this respect, avers (Rec., 19):

> Defendants allege that said troops were placed under the command of the said defendant, H. C. Benson, to enable him to exercise proper superintendency and control over the said park under and in pursuance of the rules and regulations established for the government thereof and under the directions of the Secretary of the Interior. Defendants allege that

> the command of said troops was assigned to H. C. Benson under and in pursuance of the provisions of the act of Congress of the United States approved June 6, 1900, which said act is entitled "An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June 30, 1901, and for other purposes." (31 Stat. L., 618.)

The obligation of Maj. Benson, as superintendent of the park, to enforce the regulations in question, he having a body of troops under his command for that purpose, is admitted. (R., 33.)

The United States has all the rights that inhere in sovereignty, consistent with the Constitution, for its preservation and protection and the furtherance of its ends.

The appellant contends that the rights of the Federal Government in respect to its lands within the Yosemite National Park are simply those of an ordinary individual proprietor. In support of this contention, reliance is had upon the case of *Fort Leavenworth Railroad Company* v. *Lowe* (114 U. S., 525).

All that was decided in that case was that the property and franchises of a railroad company within the reservation over which the United States had not retained exclusive jurisdiction upon the admission of the State, were subject to taxation by the State. The general language in that opinion is to be read in the light of the facts in the case, which had no reference

to the power of the Federal Government to protect the reservation lands.

It is settled by the decisions of this court that the rights and powers of the United States over the public lands within the limits and general jurisdiction of a State are very different from those of an individual proprietor. The individual must look to the State for the punishment of trespassers upon his property, but the United States is not dependent upon the State governments for such protection. It may itself prohibit and punish trespasses upon the public lands.

In *Jourdan* v. *Barrett* (4 How., 168) the court said (p. 184):

> By the Constitution, Congress is given "power to dispose of and make all needful rules and regulations respecting the territory or other property of the United States;" for the disposal of the public lands, therefore, in the new States, where such lands lie, Congress may provide by law; and having the constitutional power to pass the law, it is supreme; *so Congress may prohibit and punish trespassers on the public lands.*

See also *Gibson* v. *Chouteau* (13 Wall., 92, 99).

Congress has made it an offense against the United States to cut timber on the public lands (secs. 2461, 5388, Rev. Stat.; as amended by act June 4, 1888, 25 Stat., 166).

Provisions for the protection of trees, fences, etc., on lands of the United States, and for the protection

of such lands from trespass by cattle, etc., and prescribing penalties for violations thereof, are contained in the act of March 3, 1875, chapter 151 (18 Stat., 481).

In *United States* v. *Cleveland & Colorado Cattle Company* (33 Fed., 323), which involved the right of the Government to invoke the injunctive power of the Circuit Court for the abatement of an unlawful inclosure independently of statute, Mr. Justice Brewer, then circuit judge, said (p. 330):

> Must the Government, finding parties in possession of the public domain, even though under a claim and color of title, proceed to an action at law to establish its title before restraining such parties from improper use of such land? The Government has not simply the rights of a property owner in respect to its lands; *it has all the powers of sovereignty.*

This idea is further elaborated by the same jurist in delivering the opinion of the court in the *Debs case* (158 U. S., 564). Referring to the situation which would arise if all the inhabitants of a State combined to obstruct interstate commerce and the Federal Government had no other way to protect its interests than by prosecution of the offenders in the court he said (p. 582):

> But there is no such impotency in the National Government. The entire strength of the Nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights entrusted by the Constitution to its care. The strong

> arm of the National Government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails. If the emergency arises, the Army of the Nation, and all its militia, are at the service of the Nation to compel obedience to its laws.

In that case the court affirmed the "incontrovertible principle," theretofore announced, "that the Government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it." (*Ex parte Siebold*, 100 U. S., 371, 395; *In re Neagle*, 135 U. S., 1.)

In *Camfield* v. *United States* (167 U. S., 518) this court sustained the constitutionality of an act of Congress to prevent the unlawful inclosure of the public lands. Speaking by Mr. Justice Brown, the court said (pp. 525–526):

> *The General Government doubtless has a power over its own property analogous to the police power of the several States, and the extent to which it may go in the exercise of such power is measured by the exigencies of the particular case.* If it be found to be necessary for the protection of the public, or of intending settlers, to forbid all inclosures of public lands, the Government may do so, though the alternate sections of private lands are thereby rendered less available for pasturage. The inconvenience, or even damage, to the individual proprietor does not authorize an act which is in its nature a purpresture of Government lands. While we

> do not undertake to say that Congress has the unlimited power to legislate against nuisances within a State, which it would have within a Territory, *we do not think the admission of a Territory as a State deprives it of the power of legislating for the protection of the public lands, though it may thereby involve the exercise of what is ordinarily known as the police power, so long as such power is directed solely to its own protection.* A different rule would place the public domain of the United States completely at the mercy of State legislation.

It will be observed that in the Camfield case the act in question was held to forbid the erection of fences upon private lands in such a way as to inclose the public lands. This is precisely our contention here—that the Secretary of the Interior, under the authority of the act of October 1, 1890 (*supra*), may control the use by the appellant of his own lands within the park and the public toll roads leading thereto, so far as necessary to protect the public lands and insure the objects of the park. An individual proprietor would have to look to the State for such protection; but, as the authorities cited hold, the powers of the Federal Government in the States with respect to its property are different.

While the court in the *Camfield case* fully maintained the authority of the Federal Government to protect the public domain in the States against individual aggression, as well as State legislation, it was very cautious in delimiting that authority. We

venture to assert, however, that the power of the Federal Government with respect to its property in the States is not only analogous to the police power of the States, as the court said, but identical therewith. It is simply the power of self-protection and self-preservation, and, as was stated in the *Camfield case*, "so long as such power is directed solely to its own protection" it can not be questioned.

That the police power of the Federal Government in respect to the functions possessed by it is the same as that possessed by the States appears from our entire criminal system. Express authority to punish crimes against the United States is given in but a few instances by the Constitution, but our statute books are replete with police measures for the protection of the Government, which are identical in their nature and operation with similar legislation enacted by the States.

In *Light* v. *United States* (220 U. S., 506, 537), replying to the argument against the power of Congress to establish the reserve and withdraw the land from public use, the court said:

> The United States can prohibit absolutely or fix the terms on which its property may be used. As it can withhold or reserve the land it can do so indefinitely. (*Stearns* v. *Minnesota*, 179 U. S., 243.) It is true that the "United States do not and can not hold property as a monarch may for private or personal purposes." (*Van Brocklin* v. *Tennessee*, 117 U. S., 158.) But that does not lead to the

conclusion that it is without the rights incident to ownership, for the Constitution declares (sec. 3, Art. IV) that "Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or the property belonging to the United States." "The full scope of this paragraph has never been definitely settled. Primarily, at least, it is a grant of power to the United States of control over its property." (*Kansas* v. *Colorado*, 206 U. S., 89.)

"All the public lands of the Nation are held in trust for the people of the whole country." (*United States* v. *Trinidad Coal Co.*, 137 U. S., 160.) And it is not for the courts to say how that trust shall be administered. That is for Congress to determine. The courts can not compel it to set aside the lands for settlement; or to suffer them to be used for agricultural or grazing purposes; nor interfere when, in the exercise of its discretion, Congress establishes a forest reserve for what it decides to be national and public purposes. In the same way and in the exercise of the same trust it may disestablish a reserve, and devote the property to some other national and public purpose. *These are rights incident to proprietorship, to say nothing of the power of the United States as a sovereign over the property belonging to it.*

To hold that the Federal Government is without power to protect the Government lands in the Yosemite National Park, by imposing a reasonable restraint upon the action of owners of private lands

within the park, is to make the rights and interests of the United States dependent upon State action, which is contrary to the supremacy of the Federal Government asserted in the Constitution.

Suppose some one should engage in blasting operations upon his own land in dangerous proximity to land used by the United States as an arsenal, in which large quantities of explosives were stored, would it be said that the Federal Government must look to the State in which such lands were situated for protection?

The fundamental principle underlying the exercise of power referred to is stated by Chief Justice Marshall in *McCulloch* v. *Maryland*, 4 Wheat., * 422:

> * * * No trace is to be found in the Constitution of an intention to create a dependence of the Government of the Union on those of the States for the execution of the great powers assigned to it. Its means are adequate to its ends; and on those means alone was it expected to rely for the accomplishment of its ends. To impose on it the necessity of resorting to means which it can not control, which another government may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence on other governments which might disappoint its most important designs, and is incompatible with the language of the Constitution.

In *United States* v. *Gettysburg Electric Railway Company* (160 U. S., 668), this court held it to be within the constitutional authority of Congress to

condemn and purchase lands within the State of Pennsylvania for the purpose of establishing what is known as the "Gettysburg National Park," it being held that the proposed use of the land—to preserve the battlefield of Gettysburg—was a public use.

This case goes beyond the necessities of the one at bar. In the present case, the Federal Government is not seeking to form a national park by the condemnation of land within the State for that purpose. It has simply established such a park out of the public forest lands in the State of California, not only for conservation purposes, but to preserve the natural beauties and wonders of that particular region for the benefit of the people at large. As in the case of the Gettysburg park, the object in view is a most laudable one. Certainly if, as held in that case, the Federal Government may condemn land within a State for the purpose of establishing a national park, it has the power to set aside and reserve its own lands for such a purpose. Clearly also, for the reasons above stated, it has the constitutional authority to regulate the use of private lands within the park so as to prevent injury to the public lands and the defeat of the objects in view.

There is no difference in principle between the appellant's lands and the toll roads in respect to the authority of the Federal Government to control their use so far as necessary for the proper protection of the park lands. Whether such roads, having been constructed under the authority of section 2477 of

the Revised Statutes (appellant's brief, p. 17), are mere easements, as has been held (21 Land Dec., 351, 354; *Smith* v. *Townsend*, 148 U. S., 490, 498), or the fee has passed out of the United States, is immaterial. The United States has as much, if not greater, right to regulate the use of such roads for the protection of its own lands, as it has lands owned by private individuals within the park.

II.

Appellant is Not Entitled to the Aid of a Court of Equity.

The record shows that the appellant, Curtin, has wilfully permitted his cattle to trespass upon the park lands. Thus Maj. Benson testified (R., 38–39):

> Q. Are you familiar with the lands referred to by Mr. Curtin in his testimony?
>
> A. Yes, sir. I have been on duty in the park for several years prior to this time—since 1891.
>
> Q. State to the Court generally why it is necessary, in your opinion, to have the rule made by the Department requiring people to mark their lines by metes and bounds in some way?
>
> A. It is for this reason: Numerous people claim land in the Yosemite National Park, which they stated were their ranges. A number of them had these places surrounded by fences, sometimes enclosing, instead of 160 acres which they had, as high as several thousand acres of land. They then drove

their cattle to the so-called ranges and immediately let them loose and they strayed over those ranges throughout the entire reservation. *Senator Curtin's cattle have been in that condition for a great many years.*

Mr. Woodworth:

Q. Do you know that of your own personal knowledge?

A. *I know that of my own personal knowledge; I was present at the time and had a correspondence myself with Mr. Curtin as far back as 1895, 1896, and 1897. These cattle, as I stated, were then turned loose and strayed throughout the entire park.* I was detailed on special duty to ascertain the private claims throughout the park. In 1897 I went to Sacramento, and also recommended to Washington, and this map which is now present here is simply a copy which was used by this commission as a copy of the map which I prepared in 1897, determining the private claims within the park. The object of this was to ascertain who did own land and somewhere about where it lay. I myself went out and did considerable surveying, and found a great many people—Mr. Curtin for instance—had fenced more land than they were entitled to, paid no attention to their own lines, but had tracts of land inclosed, *and their cattle did not stay in there more than three or four days but proceeded out to the rest of the park, so a regulation was ordered that they point out their metes and bounds.* * * *

Mr. Curtin, testifying in regard to the land owned by him within the limits of the park, said (R., 37):

> Q. These lands are used for grazing purposes?
>
> A. Yes, sir.
>
> Q. There are no fences?
>
> A. Yes, sir; there are fences.
>
> Q. Not on all the land?
>
> A. No, sir; the land known in sections 18 and 19——
>
> Q. A portion is unfenced?
>
> A. Yes, sir; the largest part of it is unfenced.
>
> Q. You admit you are not complying with this regulation of the Department?
>
> A. Rules 9 and 10 mentioned?
>
> Q. Yes.
>
> A. I admit I have not complied with it, and furthermore, I will not comply.
>
> Q. And do not intend to comply with it?
>
> A. I do not intend to comply with it until I am so required to.

There was no duty resting upon the Government to fence its own lands in the park against cattle. The rule of the common law in this respect is thus stated by this court in *Lazarus* v. *Phelps* (152 U. S., 81, 84):

> The rule of the common law was admitted to be that a landowner is not bound to fence his land against the cattle of others. The owner of such cattle must confine them to his own land, and will be liable for trespasses committed by them upon the uninclosed lands of others.

In *Light* v. *United States* (220 U. S., 523), decided at the last term, it was held that equity would enjoin the owner of private lands adjoining a Government forest reserve from allowing his cattle to trespass thereon. In that case the court states the law with respect to grazing cattle on the public domain as follows (p. 535):

> At common law the owner was required to confine his live stock, or else was held liable for any damage done by them upon the land of third persons. That law was not adapted to the situation of those States where there were great plains and vast tracts of unenclosed land, suitable for pasture. And so, without passing a statute, or taking any affirmative action on the subject, the United States suffered its public domain to be used for such purposes. There thus grew up a sort of implied license that these lands, thus left open, might be used so long as the Government did not cancel its tacit consent. (*Buford* v. *Houtz*, 133 U. S., 326.) Its failure to object, however, did not confer any vested right on the complainant, nor did it deprive the United States of the power of recalling any implied license under which the land had been used for private purposes. (*Steele* v. *United States*, 113 U. S., 130; *Wilcox* v. *Jackson*, 13 Pet., 513.)

Referring to the contention that the Government had not complied with the fence law of the State, the court said (220 U. S., 537):

> Even a private owner would be entitled to protection against willful trespasses, and statutes providing that damage done by animals can not be recovered, unless the land had been inclosed with a fence of the size and material required, do not give permission to the owner of cattle to use his neighbor's land as a pasture. They are intended to condone trespasses by straying cattle; they have no application to cases where they are driven upon unfenced land in order that they may feed there. (*Lazarus* v. *Phelps*, 152 U. S., 81; *Monroe* v. *Cannon*, 24 Montana, 316; *St. Louis Cattle Co.* v. *Vaught*, 1 Tex. App., 388; *The Union Pacific* v. *Rollins*, 5 Kansas, 165, 176.)
>
> *Fence laws do not authorize wanton and willful trespass, nor do they afford immunity to those who, in disregard of property rights, turn loose their cattle under circumstances showing that they were intended to graze upon the lands of another.*

In any event, it is submitted, appellant, under the circumstances shown by the record, was not entitled to the aid of a court of equity.

The judgment of the Circuit Court should be affirmed.

Respectfully submitted.

WILLIAM R. HARR,
Assistant Attorney General.

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CURTIN *v.* BENSON.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

No. 1. Argued October 25, 1911.—Decided November 20, 1911.

While one must come into equity with clean hands, a defendant invoking the rule on the ground that plaintiff is praying for relief with an improper object in view must establish that fact.

Even if the United States can exercise over public lands the powers of a sovereign as well the rights of a proprietor, there are limitations; neither can be exercised to destroy essential uses of private property.

To take away an essential use of property is to take the property itself.

Whether a power is within constitutional limits is to be determined by what can be done under it, not what may be done.

It is beyond the power of the Secretary of the Interior or the superintendents of national parks under his control to limit the uses to which lands within the parks held in private ownership may be put; and so held as to regulations prohibiting grazing cattle on private lands within the Yosemite Park until such lands have been defined and marked by an agreed understanding.

Evidence, inadmissible generally but admitted by the court below for a particular purpose, cannot be extended by this court beyond the limited purpose of its introduction.

Quære whether owners of lands within National Park limits can be required to fence their lands, or whether the trespassing of their cattle on other lands can be made a criminal offense.

Quære whether an order of the Secretary of the Interior in regard to park lands can be construed as extending to toll roads constructed under authority of the State.

THE facts, which involve the validity of rules made by the Secretary of the Interior in regard to grazing cattle on private lands within the limits of Yosemite Park, are stated in the opinion.

Mr. William C. Prentiss, with whom *Mr. Marshall B. Woodworth* and *Mr. J. B. Curtin* in *propria personam* were on the brief, for appellants:

The Department of the Interior has no right to make or enforce any rules respecting the use of private property or

public toll roads within the State of California, for that State has not ceded to the United States its political jurisdiction over the Yosemite Park. The United States is simply an ordinary proprietor. *Lowe* v. *Railroad Co.*, 114 U. S. 525; *Chicago &c. Ry. Co.* v. *McGlinn*, 114 U. S. 542; *Van Brocklin* v. *Tennessee*, 117 U. S. 151, 167; *Palmer* v. *Barrett*, 162 U. S. 399; *Sharon* v. *Hill*, 24 Fed. Rep. 726, 731; *In re Ladd*, 74 Fed. Rep. 35; *State* v. *Mack*, 23 Nevada, 363; *United States* v. *Meagher*, 37 Fed. Rep. 878; *Crook* v. *Old Point Hotel*, 54 Fed. Rep. 608; *In re Kelly*, 71 Fed. Rep. 549; *United States* v. *Partello*, 48 Fed. Rep. 677; *Benson* v. *United States*, 146 U. S. 330.

However commendable the rules and regulations may be to protect and preserve the Park, and legal as to it, they can have no effect on or as to lands owned by private citizens or as to public roads of the State.

The right of way for the construction of highways over public lands not reserved for public uses is granted by § 2477, Rev. Stat., but every highway leading through the Park was constructed prior to creation of the Park and the lands within the park have not been reserved for public uses. The right to regulate highways is a police power and reserved in the State. *N. O. Gas Co.* v. *Louisiana Lighting Co.*, 115 U. S. 650; *Jones* v. *Brin*, 165 U. S. 182; *Patterson* v. *Kentucky*, 97 U. S. 501.

The police power—the right to administer their own internal affairs—was reserved to the States, *Mugler* v. *Kansas*, 123 U. S. 623; *Railway Co.* v. *Mackey*, 127 U. S. 205; *Holden* v. *Hardy*, 169 U. S. 366; *St. Louis &c. R. Co.* v. *Paul*, 173 U. S. 404; *Tullis* v. *Railway Co.*, 175 U. S. 348; *Gundling* v. *Chicago*, 177 U. S. 183; *Knoxville Iron Co.* v. *Harbison*, 183 U. S. 13; *Atkins* v. *Kansas*, 191 U. S. 207; *Jacobson* v. *Massachusetts*, 197 U. S. 11; *Minnesota Iron Co.* v. *Kline*, 199 U. S. 593; *Western Turf Assn.* v. *Greenberg*, 204 U. S. 359; nor do the Thirteenth, Fourteenth and Fifteenth Amendments impair the supremacy of this

power. *Barbier* v. *Connolly*, 113 U. S. 27; *Hodges* v. *United States*, 203 U. S. 6.

Parks are not instruments of government; neither can the Federal Government exercise within the limits of a State any power or authority which is not incident to some power delegated to the Federal Government. *Kohl* v. *United States*, 91 U. S. 367; *United States* v. *Fox*, 94 U. S. 315; *Van Brocklin* v. *Tennessee*, 117 U. S. 151; *Cherokee Nation* v. *Southern Kansas Railway*, 135 U. S. 641; *Shoemaker* v. *United States*, 147 U. S. 282.

Even if the Federal Government had authority to make any regulations, they must be police regulations, and cannot be valid unless it appear from their face that their enactment was for the protection of the health, safety, or comfort of the public. These rules are unwarranted and arbitrary prohibitions, and as such are unreasonable and void. *Hume* v. *Laurel Hill Cemetery*, 142 Fed. Rep. 552.

Mr. Assistant Attorney General Harr for appellee:

The regulations and action taken for their enforcement were authorized by law. Act of October 1, 1890, § 2, 26 Stat. 650. They were reasonable, and necessary, and were promulgated to save the Park. *United States* v. *Shannon*, 151 Fed. Rep. 863; Act of June 6, 1900, 31 Stat. 618.

The United States has all the rights that inhere in sovereignty, consistent with the Constitution for its preservation and protection and the furtherance of its ends.

The rights and powers of the United States over the public lands within the limits and general jurisdiction of a State are very different from those of an individual proprietor. The individual must look to the State for the punishment of trespassers upon his property, but the United States is not dependent upon the state governments for such protection. It may itself prohibit and punish trespasses upon the public lands. *Jourdan* v. *Barrett*, 4 How. 168; *Gibson* v. *Chouteau*, 13 Wall. 92, 99.

Congress has made it offenses or trespass against the United States to cut timber on the public lands, §§ 2461, 5388, Rev. Stat., as amended by act of June 4, 1888, 25 Stat. 166; Act of March 3, 1875, c. 151, 18 Stat. 481; *United States* v. *Cleveland Cattle Co.*, 33 Fed. Rep. 323; and see, as to power of the Government, *Debs Case*, 158 U. S. 564; *Ex parte Siebold*, 100 U. S. 371, 395; *In re Neagle*, 135 U. S. 1; *Camfield* v. *United States*, 167 U. S. 518, 525.

The power of the Federal Government with respect to its property in the States is analogous to the police power of the States. *Light* v. *United States*, 220 U. S. 506, 537.

To hold that the Federal Government is without power to protect the Government lands in the Yosemite National Park, by imposing a reasonable restraint upon the action of owners of private lands within the Park, is to make the rights and interests of the United States dependent upon state action, which is contrary to the supremacy of the Federal Government asserted in the Constitution. *McCulloch* v. *Maryland*, 4 Wheat. *422; *United States* v. *Gettysburg Ry. Co.*, 160 U. S. 668.

The Federal Government may condemn land within a State for the purpose of establishing a national park, and also has the power to set aside and reserve its own lands for such a purpose. It has the constitutional authority to regulate the use of private lands within the Park so as to prevent injury to the public lands and the defeat of the objects in view.

There is no difference in principle between the appellant's lands and the toll roads in respect to the authority of the Federal Government to control their use so far as necessary for the proper protection of the park lands. Whether such roads, having been constructed under the authority of Section 2477 of the Revised Statutes are mere easements, as has heretofore been held (21 Land Dec. 351, 354; *Smith* v. *Townsend*, 148 U. S. 490, 498), or

whether the fee has passed out of the United States, is immaterial. The United States has as much, if not greater, right to regulate the use of such roads for the protection of its own lands, as it has lands owned by private individuals within the Park.

Appellant is not entitled to the aid of a court of equity as the record shows that he has willfully permitted his cattle to trespass upon the park lands.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This suit was brought in the Superior Court of Tuolumne County, State of California, against the appellee, Benson, and others, who were soldiers under Benson, to enjoin them from driving appellant's stock from his lands or by any means interfering with them, and from preventing appellant driving his stock to his lands over certain toll roads. The case was removed to the United States Circuit Court for the Northern District of California where, after hearing, final judgment was rendered dismissing the bill of complaint.

The facts as agreed to, and established by evidence supplementing the agreement, are as follows: Appellant is the owner of certain lands within the Yosemite National Park (the Park was regularly and legally established, Act October 1, 1890, 26 St. 650, c. 1263; Joint Res. June 11, 1906, 34 St. 831) and lessee of other lands therein. Leading to the lands there are certain toll roads, which were established many years prior to the creation of the Park.

Appellee Benson is a captain in the United States Army and Superintendent of the Park, and, as such, it was and is his duty to enforce the rules and regulations prescribed by the Secretary of the Interior for the government of the Park, and for this purpose he has a body of troops under his command.

The Secretary established and promulgated the following rules:

"9. Owners of patented lands within the park limits are entitled to the full use and enjoyment thereof; such lands, however, shall have the metes and bounds thereof so marked and defined as that they may be readily distinguished from the park lands. Stock may be taken over the park lands to patented lands with the written permission and under the supervision of the superintendent.

"10. The herding or grazing of loose stock or cattle of any kind on the Government lands in the park, as well as the driving of such stock or cattle over the same, is strictly forbidden, except in such cases where authority therefor is granted by the superintendent."

Appellant claims the right, without complying with these rules, to drive his cattle over the toll roads and to graze them on his lands. On one occasion appellant placed cattle on his lands, and appellee Benson immediately removed them, and refused to allow them to be grazed thereon until appellant complied with the rules; and, prior to the commencement of the suit, refused to allow appellant to drive his cattle over the toll roads to his lands or to use the lands until he complied with the rules.

The testimony gave some particularity to the facts as agreed to. It appeared that appellant has within the Park a few hundred acres, and, it may be inferred, 23,000 acres in the vicinity. He asserted that he had not complied with the regulations, and did not intend to do so until required. And it was admitted that the largest part of the land was unfenced.

The following from the report of the Superintendent of the Park to the Secretary of the Interior for the year 1901 was put in evidence: "After due consideration, based upon the best evidence I have been able to obtain, I can

see no objection to property owners and those holding leased land within the park limits grazing cattle near their own premises under the supervision of the park authorities."

Testimony was introduced on the part of appellees (their counsel expressing a doubt of its admissibility) "to show [that] the regulation is a reasonable one, and the reason for it, and what effect will be produced if the regulation is not carried out." To the offer counsel for appellant replied that he denied the power of the Secretary. "It is simply a question of his power," he said, and stated that if defeated on that point he could show that the rules were not reasonable under the circumstances. The court, saying that it understood, heard the evidence, which was to the following effect: Appellee Benson had been Superintendent of the Park since April 10, 1905, and on duty there for several years prior to that time. Numerous people claimed land in the park as their ranges, and a number of them had the places surrounded by fences, "sometimes enclosing instead of 160 acres which they had as high as several thousand acres of land." They drove their cattle to the so-called ranges and immediately let them loose, and they strayed throughout the entire reservation. "Senator Curtin's cattle have been in that condition for a great many years." This he (Benson) knew of his personal knowledge, because he was present at the time and had a correspondence with Mr. Curtin as far back as 1895, 1896 and 1897. He further testified that he was detailed on special duty to ascertain private land claims in the Park, the object being to ascertain who owned land "and somewhere about where it lay;" that he did some surveying and found that a great many people—"Mr. Curtin, for instance"—had fenced more land than they were entitled to, had paid no attention to their own lines, had tracts of land inclosed upon which their cattle did not stay for more than three or four

days, "but proceeded out to the rest of the park, so a regulation was ordered that they point out their metes and bounds, for this reason: though we might know absolutely where they were," they would claim the cattle to be on their lands. If the metes and bounds were fixed by an "agreed understanding" it could be definitely known whether they were within or without the claim. He further testified that the whole place had been overrun with cattle, and that the object of the regulations was "to keep people to the use of their own land and keep the Government land from being interfered with." He did not attempt to prevent Curtin from using his land, provided he complied with the regulations, but he did remove cattle from Curtin's land on the ground that he had not complied with the regulations.

He testified further that he permitted Curtin to pasture his cattle on his land after he (Curtin) had it surveyed, but refused Curtin permission to fence according to the survey, the correctness of the survey being disputed.

It is objected by the Government that appellant is not entitled to the relief he prays because he does not come into court with clean hands. It is urged as a ground of the charge that the testimony exhibits his purpose to be to use his lands as a basis, and the toll roads as a means, to make wholesale trespasses upon the park lands. If the fact were established it might be hard to resist its effect, but it is not established. The evidence cited in support of it, and of which we have given the substance, refers to a period anterior to the time when this controversy arose. Indeed, anterior to the time when the regulations were established by the Secretary of the Interior, which was April 22, 1905, and the object of the testimony was to account for the regulations, and not to show the special and immediate justification of Benson's orders. We cannot now extend the evidence beyond the special and limited purpose of its introduction. We do

not think the case, as it was submitted to the Circuit Court, showed the ulterior purpose on the part of appellant to be a wilful trespass upon the lands of the Park, but to be an honest assertion of rights.

On the merits of the case we may concede, *arguendo*, as contended by the appellees and disputed by appellant, that the United States may exercise over the Park not only rights of a proprietor but the powers of a sovereign. There are limitations, however, upon both. Neither can be exercised to destroy essential uses of private property. The right of appellant to pasture his cattle upon his land and the right of access to it are of the very essence of his proprietorship. May conditions be put upon their exercise such as appellees put upon them? In answering the question we shall assume, for the time being, that Benson has interpreted correctly the regulations of the Secretary of the Interior. His (Benson's) order is not, it will be observed, a regulation of the use of the land, as an order to fence the lands might be, but is an absolute prohibition of use. It is not a prevention of a misuse or illegal use but the prevention of a legal and essential use, an attribute of its ownership, one which goes to make up its essence and value. To take it away is practically to take his property away, and to do that is beyond the power even of sovereignty, except by proper proceedings to that end.

A law requiring an owner in appellant's situation to fence his land might be within such power, though of that we are not required to express an opinion. A law making the trespass of his cattle on other lands a criminal offense might be within such power. Such laws might be considered as strictly regulations of the use of property, of so using it that no injury could result to others. They would have the effect of making the owner of land herd his cattle on his own land and of making him responsible for a neglect of it.

We have assumed so far that Benson has exercised a

power in accordance with the rules prescribed by the Secretary of the Interior. This, however, may be questioned. The orders of Benson are not that Curtin mark and define his lands, but that he do so "by an agreed understanding" with him (Benson), so that there could be no subsequent controversy about their boundaries. But this gives to Benson power to force a concession to his "understanding" and to require Curtin to submit to a limitation of the area of his land or a limitation of its uses. It is no answer to say that the power would not be arbitrarily or unreasonably exercised. It must be judged by what can be done under it, not by what may be done under it.

It may be doubted, too, if the rules prescribed by the Secretary of the Interior warranted Benson's order in regard to the toll roads. The rules did not deal with the toll roads at all. They do deal with "park lands" and authorize stock to be taken over them by the "written permission and under the supervision of the superintendent." But even if it be held to apply to the toll roads, it is manifestly but a regulation of the transit of the stock merely, and not a use of the roads as a condition of the performance of something else.

We, however, rest our decision on the ground of the want of power of the Secretary or the superintendent to limit the uses to which lands in the Park held in private ownership may be put.

Decree reversed and cause remanded for further proceedings in accordance with this opinion.